TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 101

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 22, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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INDEX.

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[fol. 1]

IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF SOUTH CAROLINA

STIPULATION OF COUNSEL AS TO CONTENTS OF RECORD

It is hereby stipulated by and between the undersigned counsel for the appellant and appellee herein, that the following shall constitute the record on appeal to the United States Circuit Court of Appeals for the Fourth Circuit from the judgment entered herein in favor of the appellee on April 18, 1940:

1. This Stipulation.
2. Complaint.
3. Answer.
4. Agreed Statement of the Evidence and the originals of all of the exhibits mentioned therein.
5. Court's Charge to the Jury.
6. Stipulation as to the Statement of the evidence.
7. Order Overruling Motion for a New Trial.
8. Order for Judgment.
9. Notice of Appeal.
10. Appellant's Statement of Points on Appeal.
11. Order Extending Time for Docketing and Filing Record on Appeal.
12. Clerk's Certificate of Record.

Signed and agreed upon this 2nd day of October 1940.

O. H. Doyle, United States Attorney, Counsel for Appellant. R. K. Wise, Counsel for Appellee.

[fol. 2] IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF SOUTH CAROLINA

JAMES H. HALLIDAY, a Person Non Compos Mentis by His Committee, Annie Halliday, Plaintiff

v.

UNITED STATES, Defendant

COMPLAINT—Filed November 20, 1936

The plaintiff respectfully shows to the Court and alleges:

1. That the plaintiff is now and at the times hereinafter mentioned a resident of Anderson County, in the State of

South Carolina, and within the Western District of South Carolina.

2. That heretofore, to-wit: on the 23rd day of June, 1918, James H. Halliday was drafted in the Army of the United States of America at Honea Path, South Carolina, and served in said Army as a private, until he was honorably discharged on the 2nd day of April, 1919.

3. That the plaintiff further alleges that while serving in the Army of the United States of America he applied for and had issued to him by the Bureau of War Risk Insurance of the Treasury Department of the United States of America a contract of War Risk Insurance in the sum of Ten Thousand ($10,000) Dollars, under the terms of which he [fol. 3] was entitled, in the event of total and permanent disability and unable to follow continuously any substantially gainful occupation and it was reasonably certain that that condition would continue through veteran's life in the same or a greater degree, to have the premiums waived and to receive from the United States, or some of its departments or bureaus, the sum of Fifty Seven and 50/100 ($57.50) Dollars per month during the time of said disability.

4. That the plaintiff is informed and believes that the premiums of said insurance were deducted from the Army pay of the above named plaintiff and paid to the Bureau of War Risk Insurance until the time of his discharge on the 2nd day of April, 1919.

5. That while this plaintiff was serving in the Army of the United States he became totally and permanently disabled by reason of diseases and infirmities so that from the 2nd day of April, 1919, he was totally and permanently disabled to the extent contemplated by the contract of War Risk Insurance under the Acts of Congress and regulations relating thereto and that on account of said disability, no premiums were due to have been paid on the said contract of insurance from the date of his disability, and that the [fol. 4] said contract was at that time and is at this time in full force and effect.

6. That the plaintiff is informed and believes that on account of matters hereinabove stated the United States

of America is due and owing to him the sum of Fifty Seven and 50/100 ($57.50) Dollars per month, so long as the plaintiff remains permanently and totally disabled in accordance with the terms of contract of war risk insurance and regulations pertaining thereto.

7. That heretofore to-wit: on —, and long prior thereto, the said James H. Halliday was rated incompetent by the Veterans Administration, and was, and still is, an incompetent person; that demand was duly made of the defendant in writing for payment of benefits under said contract of insurance, which claim used words showing an intention to claim such insurance benefits, but the defendant has failed to pay the same, and on —, a final disagreement was given by the Administrator's Board of Appeals.

8. That a disagreement exists between the plaintiff and the Veterans Administration as to payment of said insurance according to the terms of said contract.

[fol. 5] 9. That the Veterans Administration having declined to pay plaintiff's claim, it became necessary for him to employ an attorney to bring this action for the collection of said claim, and said attorney is entitled to a reasonable fee for his services.

Wherefore: Plaintiff prays judgment against the United States of America.

First, for the sum of Fifty Seven and 50/100 ($57.50) Dollars per month to the plaintiff from the 2nd day of April, 1919, to date.

Second, for adjudication of his right to future payments of Fifty Seven and 50/100 ($57.50) Dollars per month in accordance with the terms of the said contract of War Risk Insurance.

Third, for a reasonable fee to be fixed for the attorney for the prosecution of this action.

Fourth, for the costs of this action, and for such other and further relief as this Court may deem just in the premises.

R. K. Wise, Attorney for Plaintiff.

(Verification omitted.)

[fol. 6] IN UNITED STATES DISTRICT COURT

ANSWER—Filed January 27, 1937

Now comes the defendant, United States of America, by its attorney, C. C. Wyche, Esq., United States Attorney for the Western District of South Carolina, and for answer to plaintiff's complaint, respectfully shows the court that it has not sufficient information upon which to form a belief as to the truth of all the allegations and statements contained in the plaintiff's complaint, and therefore denies each and every allegation contained therein.

Wherefore, the defendant prays that this action be dismissed with costs.

(Signed) C. C. Wyche, United States Attorney.

Verified by O. H. Doyle, Assistant United States Attorney, January 18, 1937.

Service accepted January 19, 1937.

IN UNITED STATES DISTRICT COURT

Agreed Statement of the Evidence

Tried before the Honorable Alva M. Lumpkin, Judge, and a jury, at Anderson, South Carolina, beginning November 30, 1939. R. K. Wise appearing as attorney for the plaintiff, and O. H. Doyle and E. P. Riley, for the Government.

[fol. 7] The following jurisdictional facts are stipulated:

Claim filed June 22, 1931;

Claim denied July 23, 1935;

Notice of denial mailed August 3, 1935;

Appealed to Board of Veterans' Appeals December 21, 1935;

Finally denied by Board November 18, 1936;

Suit was filed November 20, 1936.

MRS. JAMES H. HALLIDAY, a witness for the plaintiff testified:

I am the committee for my husband, Mr. James H. Halliday, having been appointed on December 9, 1935. I first

met him in 1913, when I was teaching school at Mountain Creek in Anderson County. We were married on April 16, 1921, at which time he was taking vocational training, training to rehabilitate himself so he could do something after the War, but he never could do anything. He was taking training in Waynesville, North Carolina, and I went there. From there we went to Athens, Georgia, and stayed about a year and a half, while he continued taking vocational training. While in Waynesville, his condition did not improve, nor did he get any better in Georgia. After leaving Georgia, we came out to the little farm and he tried to work, in 1924.

[fol. 8] With reference to his condition at the time we were married, he was far from well. He complained all the time of his stomach, his heart, and his kidneys. As a result of trying to work on the farm, he became more nervous and couldn't sleep, and couldn't retain his food. It just upset him all the time. That has continued to be true up to the present time. He could not work all day. He worked maybe an hour or two.

With reference to his mental condition, he was suspicious and all that, you know. He was suspicious of everybody. That has been true since his discharge from service. He is suspicious of his neighbors too. He thinks they are all against him. He thinks everybody is against him. He has threatened to commit suicide and to kill me and the children and all. I would leave several times and go to my mother's and stay until he would get a little better. I would always go back home. He doesn't like to go off and eat away from home at all because, for one thing, he is afraid somebody is going to poison him. I do all of the cooking myself at home and he stays right with me. He doesn't like to go to a hospital. Sometimes he pours his own medicine. He thinks he is going to be poisoned. When I mention Augusta, he says he would rather die than go there. He has been [fol. 9] in the hospitals at Columbia, South Carolina, and Roanoke, Virginia. He has been to Greenville before we were married, and Oteen.

Q. Has this condition improved any since you were married?

A. None whatever.

Q. Is it any worse?

A. Well, he is harder to control now than he was at first.

Q. Well, when he wants to do anything, what do you have to do?

A. Just let him have his way.

Q. You don't try to talk him out of it?

A. I don't try to persuade him or anything.

Q. Now, that has been true ever since you have been married?

A. Yes, sir.

We have four children. I first knew that I could bring suit on this policy about 1930.

His doctors have been the Government doctors and Dr. Land here in Anderson. Dr. Land is our family physician.

I work on the farm; I cannot plow but I have done everything else.

Cross-examination of Mrs. Halliday:

Between the time of my husband's discharge and our marriage in 1921, I was teaching school and living at home with my mother, and Mr. Halliday was in the hospital dur- [fol. 10] ing that time. I saw him several times between the date of his discharge and our marriage. He came to see me and he came from his home at Iva, which is about 18 miles from where I was living, or else he came from the hospital where he was taking treatment. He came with his brother who visited another teacher. They just came together. He would come when he had an opportunity when he was at home.

Prior to our marriage, he had been in Johnson City, and we went then to Waynesville where he took training in agriculture. It must have been in the Fall of 1922, when he went to Athens. He took agriculture at Athens. He did not go to school every day. His training ended in the Spring of 1924, but he was in the hospital part of the time. Our first child was born February 3, 1922, at which time I was at my mother's at Due West. The next was born May 21, 1925, and the next two (twins) were born on February 18, 1927.

Mr. Halliday kept up a $3,000 portion of his insurance by the payment of premiums, and premiums are still being paid on that portion. I think it was in 1927 that he converted the $3,000 war risk contract into a policy of ordinary life insurance. I believe that in 1925 he applied for insur- [fol. 11] ance with the Pacific Mutual, but he did not get it. I don't know why.

In 1924, we rented a farm of 50 acres, known as the Long Place, from Dr. Burriss, Mrs. Pearl Long's brother-in-law, and my husband tried to farm. He had hands and tried to see what they did. We rented it for the years 1924 and 1925, and then went to where we are now, near Townville. We bought this place but have never paid for it. It has 73 acres. We haven't done any farming much, we have just had little patches. We raise a little bit of cotton each year, which is ginned at the neighborhood gin at Mr. Richardson's, and at Mr. McLees', and sometimes at Mr. Sullivan's, which is the nearest. I have tried to tend to that business, and we have had hands. The hands take the cotton to the gin. I pay the hired hands, and when Mr. Halliday was in the hospital I settled up for the ginning of the cotton. Since 1925 he has been in the hospital a good bit, and not always just for examinations. He spent three months one time and a month several times, but usually only for regular periodic examinations, usually at the hospital at Columbia. Yes, he has been sent to a mental hospital, in 1936, and stayed there about 30 days. That was the only time, and [fol. 12] he was discharged from the hospital. I have never requested that he be sent to any mental hospital because he did not want to be, although I thought it would be a good thing to put him away in a mental hospital, and his own physician has considered it necessary. I don't now insist that he be sent to the State Hospital in Columbia, but I think he should. I have suggested that he go to the hospital for mental diseases in Augusta, but he resents it so when I suggest it.

Five bales of cotton were produced on our place this year. We do not have any tenants, but Mr. Halliday did not raise the cotton. The boys and I have done that.

The Court: When was that?

Mr. Doyle: This year.

The Court: When was this adjudication and the appointment of a committee?

Mr. Doyle: I don't remember.

By Mr. Wise:

Q. When were you appointed his committee?

A. December 9th, 1935.

The Court: Well, I have been giving a good deal of thought to these situations, Mr. District Attorney. You

may have some authorities on it, but in these cases where a committee has been appointed and there is a solemn adjudication of the Probate Court, I don't think we ought to [fol. 13] inquire into any acts and doings of any kind subsequent to the date of that appointment, otherwise we would be collaterally attacking the adjudication of the court of exclusive jurisdiction as to the mental capacity of this boy.

Mr. Doyle: Except this. The judgment of this Court, if one is awarded, would be based upon the theory that the plaintiff, that is, the insured, will always be disabled or that it will continue throughout his lifetime. Such testimony might bear on the fact that there is an improvement or that there is no likelihood that the disability, if any, would continue throughout his lifetime. I don't think there is any presumption of law that one adjudged incompetent would continue to be throughout his lifetime.

The Court: There is only one way to do that; by a proceeding in that court or by the State Hospital at Columbia.

Mr. Doyle: The only way to upset that adjudication is on the question whether he is now competent. The question now is, if he is incompetent, will he always remain so.

The Court: Any judgment obtained at this time on this contract of insurance would be payable up to the date of the judgment and no more. This Court cannot bind you [fol. 14] or by its edict or order require you to continue paying it. Why take testimony on it if the Probate Court of this County has declared this man to be of unsound mind. I would charge the jury that he was totally and permanently disabled absolutely.

Mr. Doyle: As of that time.

The Court: On up from that time.

Mr. Doyle: But, your Honor, you cannot tell the jury that he will be of unsound mind all the time.

The Court: No, sir, but any testimony that you bring in now from December, 1935 up to date, as to any acts and doings or anything else, would be an attempt, it seems to me, to set aside the solemn adjudication of the Probate Court. I believe that whatever testimony the Government produces as to any acts and doings of this man, factual matters that might aid the Court and jury in arriving at a conclusion, would have to be limited up to December, 1935. From then on, I will have to charge the jury that up to this present time he is absolutely and totally disabled.

Mr. Doyle: Your Honor would also have to charge the jury that not only is that true, what you have just stated, but that before they can find a verdict, they must find that [fol. 15] it is reasonably certain that this condition will last throughout his lifetime, because that is the definition given under the statute.

The Court: I will be glad to charge that, because it is reasonably certain that he will remain in that condition.

Mr. Doyle: I will have to except to that, your Honor.

The Court: I think the cases are against you on that, because I have looked them up. The only way to attack that is by a direct attack in the Probate Court. I don't think we ought to take up the time of the Court or the jury in inquiring into matters from December, 1935 up to now. Now, prior to that time, you would have every right in the world, because he was then, so far as the world looks upon it, a man going about every day. You present your testimony, the plaintiff presents hers, and it is a question for the jury, but I just feel so satisfied in my own mind that I would be derelict in my duty if I did not put a stop-sign right at the date of the adjudication of insanity.

[fol. 16] Mr. Doyle: Your Honor, I don't know whether I made my position entirely clear. From that date that is a judgment of the court and I cannot attack it collaterally. I would have to go into the Probate Court to do that.

The Court: That is right.

Mr. Doyle: If I go into the Probate Court, I might not successfully do it, but the question here goes one step further. It is not a collateral attack on that judgment, but it is testimony on which this jury will want to answer the question, is it reasonably certain that he will always remain so.

The Court: As to that, I will charge the jury that so long as by the order of the Probate Court he is solemnly adjudicated a lunatic under the laws of this State, it is presumed that he will remain so. Of course, I will allow you an exception. I don't think we could trifle—I don't, of course, mean any reflection on counsel, but I don't think that you or I either one could trifle with the adjudication of the Probate Court, and I think we should respect it right from the moment that it should be respected. Your testimony, as I see it, ought to be limited up to December, if that is the correct date, December, 1935.

[fol. 17] Mr. Doyle: If your Honor rules now that my testimony is stopped as of that date, then I just won't attempt to go into the future.

The Court: I don't think I would inquire into that, because you will be allowed an exception.

Mr. Doyle: I will just stop at that point and take an exception. That will shorten it.

The Court: That will shorten it. I think the main issue is to go back to the discharge. Is this suit based on the insurance still in force?

Mr. Doyle: No, sir. I think I ought to state now, Mr. Wise is suing back to the date of discharge, but this insurance remained in force through September, 1920.

Mr. Wise: That is fine. I didn't know that.

Mr. Doyle: There are certain lapses and renewals, but I will show you the record on it.

The Court: It would be agreeable to stipulate it.

Mr. Doyle: I can give the dates on which it was lapsed and renewed.

The Court: If the final date of lapse is agreed upon, we can take that date and work forward.

Mr. Doyle: Well, let us just state the fact that the record shows. The original insurance was paid through April, 1919.

[fol. 18] The Court: What was the date, the exact date?

Mr. Doyle: Well, it was through April. Then it lapsed and was reinstated effective August 1st, 1920, and premiums were then paid through September, 1920, which would make it finally lapse, including the days of grace, on October 30th, 1920.

The Court: All right, sir. Thank you very much, Mr. Doyle.

Mr. Wise: If your Honor please, counsel for the plaintiff has no objection to his asking any questions as to the record of his activities since the appointment of the Probate Court was made. It is true that we have no proof, as Mr. Doyle stated, that it is reasonably certain that this condition will continue throughout his lifetime. I don't know that that question has ever come up. Of course, in our medical testimony we will have proof as to that. I think that the Government records in court will show that the man evidently was insane, according to their own records. So far as we are concerned, we have no objection to any-

thing he wants to ask since 1935. That is our position on that.

The Court: Well, sir, my own judgment is that there is no need, reason, or legal right to go into the facts from December, 1935 on, but if you have no objection, go right ahead and cross-examine the witness on matters up to date. [fol. 19] Mr. Doyle: I don't want any halfway measures about it. If I am permitted to attack it, I want to attack it all the way through, medical records and otherwise.

The Court: I would not let you go into the medical side, because three doctors have declared him to be of unsound mind and he has been declared by the State of South Carolina to be of a fixed mental status. We might as well rely on my former ruling. I will allow an exception and we will not go beyond 1935.

[fol. 20] J. M. Broyles, a witness for the plaintiff, testified:

I live on a farm near Townville, in Anderson County. Mr. Halliday moved to that community some time near the Spring of 1925—I don't remember the exact date. They live about 3½ or 4 miles from me. They came to our church regularly and moved their letters there. Mr. Halliday's farm is all river and hillsides, rock and gully, and the bottoms are swampy. I went there once to collect church dues and he was trying to cultivate and was dirty all over. He told me that the cultivator had turned over with him. That was the kind of land it was.

I have observed Mr. Halliday's mental and physical condition but it is hard to explain it. From the time he moved there through December 1935, what time I was with him and had occasion to see him he seemed to be all unbalanced, both mentally and physically and I told a Government man this several years ago. I didn't see how a man could work and get along in the physical condition he was in. He was always complaining and "jowering." I reckon he has been mad at me, he stopped speaking to me, or coming around me. I reckon he is mad at me. He wanted me to do something for him and I wouldn't do it, and he hasn't spoken [fol. 21] since. He is sort of crossways with most of the neighbors up there. He doesn't like my son-in-law; he doesn't seem to like anyone from the way he acts. I can't tell his own feelings, but from the way he acts is all I have

to go by. I would not have hired him as a farm hand at any time since 1925. I wouldn't want such labor as he would give me. I would not be sure whether I have seen his wife work on the farm. I have seen her picking cotton. I have not been about her home. They are four miles off the road where I would go anywhere, and it was very seldom I was down in that section.

Cross-examination of Mr. Broyles:

Q. Now, what year was it, Mr. Broyles, when he moved close to you?

A. I wouldn't say positively. It was some twelve or fourteen years ago. I have no recollection of the date.

Q. Do you know where he moved from?

A. I don't know that either. I don't know where he moved from. The first I knew, he moved on this place and came to Church.

Q. I was about 1925 or 1926, wasn't it?

A. Somewhere along there, I imagine.

Q. I believe Mrs. Holliday said they lived on the Long place in 1925.

Mr. Wise: 1924.

By Mr. Doyle:

Q. 1924, so it must have been either 1925 or 1926 when they moved up near you. You say that is pretty rough land on [fol. 21a] his farm?

A. Yes, sir.

Q. Did you see him prior to 1935 working on that land?

A. Along in that time. I haven't been about his place there for some four or five years, since he got so he wasn't friendly with me. He stayed at home and I stayed at home.

Q. I am talking about before 1935. Did you see him often before that?

A. Not often. Not after he quit coming to Sunday School.

Q. He came pretty regular in those days?

A. He came every Sunday until he quit and moved to another Church.

Q. In 1925, 1926 and 1927 and those years, he was going to Church rather regularly, wasn't he?

A. Yes, sir.

Q. And at that time he was getting along with his neighbors, and it was after that time that he commenced showing

signs of not being able to get along with his neighbors, and it was after that time that he withdrew from the Church, wasn't it?

A. Yes, sir.

Q. And joined somewhere else. So during those years, he was so far as you could tell, doing very well?

A. No, he never was normal from the first time I knew him; not what I would call a normal man or what I would [fol. 21b] myself want to do.

Q. Do you remember a gentlemen, Mr. Wright, who came to see you in March, 1938?

A. Some man, yes, sir.

Q. And you told him what you remembered?

A. Yes, sir.

Q. And gave him this signed statement? (Handing paper to witness). That is the statement you gave him and your signature?

A. That is it.

Q. And that is a true statement, isn't it?

A. Practically straight, yes, sir.

Mr. Doyle: Mark that for identification.

Statement of J. M. Broyles, dated May 23, 1938, hereinabove referred to, is marked for identification and initialed, "W. M. W."

Q. So you fell out in 1935; I mean he fell out with you? I know you well enough to know that you are not going to fall out with anybody. That would be about 1935?

A. That would be about right, I reckon.

Mr. Doyle: That is all.

The statement of J. M. Broyles, dated May 23, 1938, above referred to and subsequently introduced in evidence as Government's Exhibit #4, is as follows, except for the omission of the part relative to Mr. Halliday's condition subsequent to December 1935:

I am acquainted with James Haskell Halliday and remember that he came to this section a few years after the [fol. 22] World War. He has a one horse farm and farmed it regularly up to four or five years ago. I don't know exactly how much cotton he made but it couldn't have been over six or eight bales. When he first came here he seemed

a little peculiar in his mind but we didn't notice anything wrong with him physically and his mind seemed to gradually get worse. I would not consider him to be permanently and totally disabled at the time he came here, as he did a lot of work then, but * * *.

Redirect examination of Mr. Broyles:

Q. Did you write this statement up?

A. No, the gentleman who came to see me.

Q. Do you know whether he put down everything you told him?

A. No, he didn't. He put down sort of a synopsis.

Q. Did you tell him all you have told the Court?

A. No, not all I guess.

Q. Is there anything else you want to tell about this boy's condition?

A. No, I think I have about covered the ground.

Q. Did he ever come to your place to visit you?

A. Yes, sir.

Q. Did he talk much?

A. He talked all the time nearly and I wouldn't get in a word or two.

Q. Did you ever talk to him at a time in your life that he wasn't complaining?

A. I don't think so.

Mr. Wise: All right.

[fol. 23] Mr. Doyle: That is all.

Witness leaves stand.

Henry Jackson, a witness for the plaintiff, testified:

I am a cotton buyer in Anderson, South Carolina. I have known James H. Halliday practically all of his life. We were raised in the same neighborhood. Prior to the World War he was a good normal country boy. He was in good shape and did good work. I have seen him pretty often since his return from the Army.

Q. What have you observed about his condition now compared to his condition before he went to the army?

Mr. Riley: Your Honor, we would like for him to put the date prior to 1935.

By Mr. Wise:

Q. Well, from the time he got out of the army—of course, they insist that we limit that.

The Court: I think it is right. The Court will tell the jury and will tell the witness that from 1935 on, he has been judicially declared to be of unsound mind. Now, there is no use, I think, to take up the time by going on. You can state that he was declared of unsound mind in 1935, and [fol. 24] from then go back to his entrance into the army.

By Mr. Wise:

Q. Up to 1935, from the time he got out of the army, he was in the hospital some of the time sick and taking vocational training. Up to 1935, how did his condition compare, physically and mentally?

A. Well, for the last several years, it seems that he has been in a highly nervous state and he talks quite a bit about himself, about his general condition. He seems to dwell on that pretty considerably; and from his appearance, he looks like he was in pretty bad shape, from a nervous standpoint.

I cannot say that I know exactly what is wrong, but he was in good shape before he went in the Army. He was strong before that. As to whether or not, since the War, he thinks people in the community are against him, and as to whether he has ever been made at me, well, he dwells on that.

Cross-examination of Mr. Jackson:

I would say that for the last 10 or 12 years he has seemed to be very nervous. I have not visited at his place. I have just seen him here in town. I have had no opportunity to see him at his farm, nor to know whether he did any work. [fol. 25] I don't know anything about whether he transacted any business at his farm.

B. M. Stevenson, a witness for the plaintiff, testified:

I operate a drugstore in Anderson, South Carolina, and have known James H. Halliday about 25 years. I knew him before the World War. I was 19 when the War ended. I knew him very well before the War. He worked in the fall

for B. T. Anderson Clothing Company, and I worked at a drugstore across the corner. He worked there during the fall and market season.

After he returned, he seemed to be a changed man in respect to his different friends he had before he left. He didn't seem to keep in touch with them. He seemed to find fault with them or something was wrong with him. He didn't seem to be the same man. Yes, he has been mad at me a lot of times. Before he went into the Army he had quite a number of friends and used to sit around the drug store where I worked, but since he came back he argues with everybody he sees nearly about his condition, and he is in bad shape and has been in bad shape. He is always wanting some new remedy to help him; some new medicine. He complains about his physical condition.

[fol. 26] Cross-examination of Mr. Stevenson:

Mr. Halliday was not always by himself when I saw him in town prior to 1935. He was sometimes with his wife, and sometimes by himself. He came in my store and would talk to all of us. He was an old friend before he went to the Army, but since, well sometimes he gets mad.

S. E. Leverett, a witness for the plaintiff, testified:

I am the postmaster at Iva. Prior to the World War, James H. Halliday had a farm about 2 or 2½ miles from Iva, and I think that was his occupation, farming. There was nothing unusual about him at the time. I was discharged from the Army in March 1919 and came home a little before he did. Since then I have seen him occasionally once or twice a year, but for the past 2 or 3 years I can't say that I have seen him. I heard that he had taken vocational training. I keep pretty well posted on the boys around home.

I saw him fairly regularly for several years after his return, but since they left that country I have just seen him intermittently since that time. When he returned he seemed to be a man that didn't have a grip on himself. It was nervousness of some kind. I don't know what the medical term would be. It seemed that he didn't have the best con-
[fol. 27] trol of himself. He was nervous and in that con-

dition. It seemed to me that he complained about his condition. I couldn't say whether he was or was not more talkative after the War than he was before. I don't recall that very clearly.

Cross-examination of Mr. Leverett:

I could not be sure as to when he took vocational training, or when he was in Waynesville and Athens. I just met him and his brothers as they passed through Iva there and stopped. I couldn't have seen him in Waynesville.

E. H. Halliday, a witness for the plaintiff, testified:

I am the eldest brother of James H. Halliday and live near Anderson, South Carolina. I have a small grading and hauling business known as E. H. Halliday & Son, operating about twenty trucks. My brothers, James H. and Crimes W. Halliday both served in the World War.

I was on the farm with my mother when my brothers returned from the Army, having moved back there to help her when they went away. I remained at the farm for two years after their return, until a younger brother was old enough to take charge of it. I wired my brother, James H. Halliday, money to come home from New York after his [fol. 28] discharge, and when I saw him I observed that he was a physical wreck. I detected in five minutes the expression he had was not right, he was nervous and his complexion was bad. He had lost a lot of weight and was altogether a different man. He tried occasionally to work on the farm. He came down and tried to help one day, but he was never able to make a full week since he came out. As to what would happen when he tried to work, it was just like you or I if we had no strength we would have to sit down. He complained the first day with his stomach. He had some medicine, milk of magnesia, in his suitcase and was taking it the first day he came home. He wanted to dwell on the War continually and talked freely about it.

He and I could always agree up until the War, but after he came back we couldn't agree and cannot yet. He doesn't like me. As to whether he has kind of got it in for me, I don't know. I haven't spoken to him for 2 or 3 years. He never comes around my place of business.

Cross-examination of E. H. Halliday:

When my brother first went to Waynesville I saw him possibly once every 2 or 3 months. After he left Waynesville I possibly saw him every week-end or every other week-end. He and his wife didn't come home often from Waynesville. I only saw him when he visited the family. [fol. 29] The visits were not what I would call regular visits. He and his wife would come from Athens maybe a week-end or every other week-end. Sometimes they would stay at my mother's and sometimes they would come to see me. Just the ordinary week-end visits a person would make. Just like you and me coming to see our folks when we took a notion to come. I don't think he is on friendly terms with anybody. This has been going on through the years.

PLAINTIFF'S EXHIBIT 1

Plaintiff's Exhibit #1, consisting of reports of examinations of the plaintiff by Government medical examiners and of Government hospital records relating to the plaintiff, contained the following:

April 12, 1920. Diagnosis: Chronic Pulmonary Tuberculosis moderately advanced, arrested.

May 13, 1920. Diagnosis: Tuberculosis, chronic pulmonary, moderately advanced Arrested.

February 14, 1921. Diagnosis: Amygdalitis, chronic, Talipes valgus, Tuberculosis, chronic pulmonary, arrested, Hypochondriasis.

[fol. 30] February 16, 1921. Diagnosis: Tuberculosis, chronic pulmonary, arrested.

July 30, 1921. Diagnosis: Pulmonary Tuberculosis, chronic, apparently arrested.

May 9, 1922. Diagnosis: Tuberculosis, Pulmonary, Chronic, Inactive.

June 7, 1922. Diagnosis: Tonsil-itis chronic; Tuberculosis, pulmonary chronic, arrested. Pes planus, second degree.

May 11, 1922. Diagnosis: Questionable chronic pulmonary tuberculosis, arrested. Chronic tonsillitis. Patient should have tonsils removed, which probably would remove the pain and aches in muscles and limbs.

August 25, 1922. Diagnosis: Tuberculosis, pulmonary, chronic, Inactive, apparently arrested.

September 30, 1924. Diagnosis: Tuberculosis Chronic Pulmonary.

December 17, 1924. Mental examination: Patient answers questions readily and accurately. Orientation and memory good. Insight and judgment good. There is no history or evidence of any psychosis.

Pulmonary diagnosis Positive; apparently arrested; minimal (incipient).

Findings of Board: It is our opinion that claimant has an industrial disability of fifteen (15) per cent from Tuberculosis, chronic pulmonary, minimal involvement, apparently arrested. There is no N. P. Disability.

November 24, 1925. Diagnosis: Dental caries of teeth. Tuberculosis, Chronic, Pulmonary. Psychoneurosis, Neurasthenic Type.

[fol. 31] November 24, 1925. Neuropsychiatric examination:

Claimant says that he is unable to work, has many fears, and at times feels that everything is going wrong; loses confidence in himself although he still has a great amount of ambition. Not able to work at manual labor, becomes depressed and blue, and worries a great deal. Rest is disturbed at night, has a feeling of impending danger, occasionally thinks that the government is not treating him right; rest at night is disturbed. Suffers with dizziness and bodily weakness, occasionally gives and has to stop what he is doing. Claimant appeared very nervous during examination and was difficult for him to keep still. He has numerous somatic complaints, and complains of a great many things which physical examination fails to reveal. Orientation and memory good. Apparently no insight into his condition. No evidence of auditory or visual delusions or hallucinations. Shows no apparent deterioration.

Diagnosis: Psychoneurosis, Neurasthenic Type.

March 16, 1927. Diagnosis: Bronchitis, Chronic, Moderate Severity.

Neuropsychiatric examination:

The following is a sample of stream of conversation: "I just ain't stout—there are so many things wrong with me, I think I've got everything—maybe I think I have a whole lot wrong with me that I ain't got. It shoots me worse to come down here on the train, than anything else—feel like

I got grippe now. Sometimes I feel fairly well. I ain't got [fol. 32] no physical strength—I just naturally ain't strong." Claimant says that he has mental fatigueability, feels tired mentally, as well as, physically; suffers with headache and indigestion. States that he has been taking medicine—milk of magnesia and syrup of figs, and soda every night for the past seven years—has got to where he can't even retain that, and he "vomicks at night." States that he stays constipated a good deal of his time, and that his medicine has got to where it does not do him any good. Everything he eats, even to milk he drinks, sours on his stomach. States that he believes he has Tuberculosis, or Ulcer of the stomach. States that while in the service unloading meat, a heavy box fell on him, and injured his back, and that he was in plaster of paris cast for about three months, and that his stomach trouble and indigestion date from that time.

Claimant is listless and ap*pe*thetic—shows a great deal of hebetude; is introspective—anxious attitude. No evidence, however, of any Psychosis.

Diagnosis: Psychoneurosis, Neurasthenic Type, Moderate Degree.

December 15, 1929. Diagnosis: Psychosis, neurasthenia type.

January 15, 1930. Diagnosis: Psychosis, neurasthenic type, moderate.

December 21, 1932. Mental Examination: Patient has the same nervous complaints as on the last Bureau examination, March 16, 1927. States that he used to have all kinds of superstitions and fears and imaginations; that he might be in the field and would imagine that someone was in the woods with a gun fixing to shoot him. Is not as suspicious or imaginative but while that part is better, his stomach condition is worse and his nervousness is still just as bad. [fol. 33] Heart flutters a great deal and beats too fast. Feels tired mentally and physically all the time. Has no energy and no physical strength or resistance. Still vomits very frequently; suffers with indigestion; food and water sour; medicines nauseate him and make him vomit. Injured his back while in service and had to wear a plaster cast. Says the cast was too tight and irritated his stomach and he had to drink a lot of milk, and he dates his stomach trouble from that time on. Patient still presents an apathetic, listless attitude and manner. Anxiety, introspection

and hypochondriasis characterize his general attitude and manner.

Diagnosis: Psychoneurosis, Neurasthenic Type, Moderate Degree.

September 13, 1933 to November 24, 1933. Report of hospitalization at Columbia, South Carolina.

Mental Examination: This patient has been examined more than once in the past and has shown neurasthenic symptoms each time. His complaints today are nervousness, worse at times than at others. States that any excitement or sudden happenings seem to tear his nerves all to pieces; states he is weak all the time and has no energy, just simply feels tired all the time and not able to do anything. Stomach has been bad for fifteen years. States he is irritable over the least little thing. Gets over it quickly but feels weak after this. Bowels are kept regular all the time by taking active medicine but he has pains in his stomach. Patient, at one time, had a number of phobias and obsessions and peculiar imaginations but is not suffering from those symptoms lately. States that he cannot sleep at night, gets no rest. Patient shows lowering of his emotional tone, anxious facial expression, rather apathetic [fol. 34] and restless in his attitude and manner. Introspection, apathy and hypochondriasis characterize his general attitude and manner.

Diagnosis: Psychoneurosis, neurasthenic type, moderate degree.

April 11, 1935. Diagnosis: Bronchitis, chronic, mild.

Mental examination: Patient is not very high in the intelligence scale. He is unable to state his symptoms and his past history in a very intelligent manner. Seems hesitant about answering a number of questions, particularly those with reference to his industrial history. It seems that he has never been a very ardent worker. States that at the present time he has rented out his farm. Still keeps a mule, plants a garden and patches around the house; later contradicted this statement and stated he did do some work on the farm. His industrial history is unreliable. Shows a lowering of his emotional tone. Anxious facial expression. Has an apathetic, resigned and slumped attitude. He is suggestible, introspective, hypochondriacal. His complaints with reference to his nervous symptoms have not changed. He still complains of being easily excited by sudden noises or happenings, feels weak and tired

most of the time and states he is unable to hold out at work. Still has stomach trouble. Is irritable. Has no delusions, hallucinations or paranoid ideas. No evidence of a psychosis is elicited. No change is found in this patient's condition since his last examination.

Diagnosis: Neurasthenia, Moderate Degree.

[fol. 35] (Subsequent examination reports, dated December 18, 1935, and June 30, 1936, contained in Plaintiff's Exhibit #1, were offered in evidence by the plaintiff, but objected to by the defendant and excluded by the Court.)

Dr. J. N. Land, a witness for the plaintiff, testified:

I have practiced medicine in Anderson County, South Carolina, since 1903. I was the family physician of the Halliday family, and have known James H. Halliday since he was a little tot. He was a very bright boy before he went into the Army. I came in contact with him in 1919. As to what I know about the boy physically and mentally, from the time he was discharged from the Army up until December 1935, well I found that he had an arrested case of tuberculosis, he had some arthritis, and he had a mental condition which I thought at the time, and still think, was a psychoneurosis. In other words, he was rather much of a hypochondriac. Psychoneurosis, of course, is a mental condition which makes a man think he has everything the matter with him. He came in and complained of everything. He is complaining all the time. Psychoneurosis is a condition where a man imagines everything. In psychoneuorsis a man's mental condition is such, for instance, if I may put it in plain language, that you might suggest to the man that he has a new disease, and he proceeds upon that opportunity to tell you these things and it rolls up and becomes a big thing to him. He is the talking [fol. 36] type insanity. He has talked to me every chance he has got since 1919. He wants to know if I can do anything for him; that nobody else can do anything for him. He has not been friendly to me at all times. I have never done him any harm. He does talk about me. I just go ahead and do the best I can for him. I would say his mental condition would keep him from working. He is not able to judge the necessity of the thing to be done about

his business. I would not have advised him to do any work since he has been out of the Army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically. He is not physically in good shape, and is mentally in bad shape. When he got out of the Army I didn't hold any hope for his recovery, a man in his condition will go from bad to worse. I think he has gradually progressed since he came out of the Army. I was instrumental in having a committee appointed for him.

The report of February 1921 shows hypochondriasis, that is a morbid, imaginative condition. A hypochondriac imagines everything. He imagines his best friends are his enemies. As a matter of fact, in my conversations with [fol. 37] this man he has dwelled on the fact that everyone of his neighbors and his old friends are doing everything that they can to double-cross him, as he expresses it. That follows that line of mental disability. You never find two mental cases exactly alike.

Q. Doctor, I will ask you this. Did you ever find anything actually wrong with his heart?

A. Signs of an arrested tuberculosis.

Q. Does that affect a man's heart sometimes?

A. Sometimes, yes, sir.

Cross-examination of Dr. Land:

As to whether I was ever really the plaintiff's family physician, yes, sir.

Q. When?

A. Since about six years ago.

I really don't know whether Dr. Webb at Townville was his physician prior to that time, or who was his physician. I have only been his physician since about six years ago, and from 1919 to that time was not really his physician, and for that period I really don't know anything professionally about him, except from observation. I did not examine him physically until about six years ago.

[fol. 38] Q. And you did not make any examination of him mentally?

A. Mr. Doyle, you know a mental examination consists largely of an examination of the patient.

Q. He was not your patient at all?

A. No. The mental condition is largely judged by conversation.

Q. You are not a mental expert are you?

A. No, sir, I am in the general practice.

Q. A general practitioner. Now, during the first four years after his discharge from the army, when he was taking vocational training most of the time, would you say you had seen him at all during that period?

A. During what period?

Q. The period he was taking vocational training. He was at Waynesville during that time and at Athens, Georgia, and you were here in Anderson practicing medicine?

A. I couldn't say that I had seen him at any stated time. I would see him occasionally on the streets or in a drug store, and every time I would see him he would insist on having a conversation and telling all his ailments. Talking about a mental expert, we all have to be enough of a mental expert to pass on insanity to commit people to hospitals. I don't profess to be a mental expert.

[fol. 39] Prior to the adjudication in 1935, I did insist as a doctor that he be sent to an institution. I sent him to one of the Government institutions for an examination. He stayed, I imagine, about thirty days.

Q. Now, when you testified in the Probate Court that he should have a guardian appointed for him, right then and prior to that time you didn't think he ought to be committed to the State Hospital for the Insane?

A. He was not at all violent and I considered that if he could have somebody transact his little business for him, that since he was not violent it would not be necessary to commit him to an insane asylum.

Q. You didn't think so then?

A. I did not.

Q. Nor at any time prior to that time?

A. I did not.

Q. You say, in other words, that he was not crazy then. He had psychoneurosis. That is nervousness?

A. Neurosis is nervousness and psychoneurosis is a disease in which the brain is unbalanced to the point that they imagine almost anything.

Q. Imagines he was sick?

A. Imagines he was sick.

[fol. 40] I wasn't able to find anything else except arrested tuberculosis, some arthritis, and a few other little things. The tuberculosis was arrested, but was not cured. It was not active. The arthritis was a minor condition. As to whether it was serious at all, that is where his mental attitude comes in. He imagined it as well as he imagined that everybody was against him. That is where he showed his mental unbalance. Psychoneurosis and hypochondriasis are practically the same thing.

I have no record of any visits to him in 1920 and 1921, and made none until 1932 or 1933. I would say I saw the man at least two or three times a year, possibly more. Probably more all the way from 1919.

Q. But he was not talking to you professionally at all?

A. He would talk to me professionally in this way. He always wanted me to do something for him; could I give him something for his stomach; could I do this and that and the other. He could not get anybody to do anything for him; the Government wouldn't do anything; this man and that man were doublecrossing him, and he would then gradually get on to his neighbors, and they were doublecrossing him.

Q. You knew that he had other doctors who were waiting on him?

A. I never paid any attention to him. Prior to 1932, I never prescribed. I just told him to try so and so.

Q. You didn't think anything was the matter with him?

A. I thought he was a crazy man. You have just got [fol. 41] to handle those people the best you can. He was not my patient. I simply shunted him off and got away from him as best I could.

The first time I examined him was about six years ago. I think I gave him something then. He seemed to have hyperacidity, and I gave him something for that. That is a condition of the stomach. I knew he had been under the care of the Government physicians for years, and I always thought that any ex-soldier is due to be treated without cost. As to whether hospitals are available and have been, not always. Not always since 1925. There is not always one available in Columbia. It was not in 1937. As to whether or not he could have gone to any of the Government hospitals in Columbia, Oteen, Johnson City, and Augusta, I don't know. I don't know whether he has ever stayed in one more than three months. The record will

show. I don't know whether he went there largely for routine examinations. I know just what I came in contact with personally. I know I tried to get him in the Columbia Hospital and they refused to take him. That was in 1937. They refused to take him and suggested that he be taken to Augusta, Georgia, and they discharged him from the hospital in Roanoke as mentally competent, yet they [fol. 42] wouldn't take him for intestinal trouble in Columbia. I wrote them a letter asking why, if he was mentally competent when he was discharged from Roanoke, they wouldn't take him in Columbia for intestinal trouble and wanted to send him to Augusta. I asked that question and they never answered it.

Redirect examination of Dr. Land:

My opinion about his mental condition since 1919 is based on my own knowledge, and not on what somebody else told me.

Q. I believe you have already said that your prognosis back in 1919 was that you never did think he would recover. Has that been verified by the fact he is in the same condition now or probably a little worse than he was back in 1919?

A. Yes, sir.

Mr. Wise: If your Honor please, I have never done this before and don't know whether it is correct or proper or or not. I have the plaintiff in Court. I feel that he is not able to take the stand, still I would like to put him in as Exhibit A, B or C somewhere in the trial of this case.

[fol. 43] The Court: You would not, under the conditions, be required to put him on the stand.

Mr. Doyle: I won't object to his putting him on the stand. I won't cross-examine him unless he asks him some questions.

Mr. Wise: I just wanted the jury to see him.

Crymes W. Halliday, a witness for the plaintiff, testified:

I am a brother of the plaintiff. Prior to our entry into the Army we both worked at the Anderson Brothers Dry Goods Store and were paid $100.00 a month or $25.00 a week. When they moved the firm to Greenwood from An-

derson, my brother got $150.00 a month. When I first saw my brother after his return from the Army, his condition physically and mentally was practically the same as it is today. I would say he was a complete physical and mental wreck, very badly torn up physically and mentally. We both stayed on the farm with our mother. My brother went to hospitals and he took vocational training. I have not seen him do any successful work since he was discharged. As to whether my brother is mad at me, well sometimes he is mad and sometimes in good humor. I am always in good humor with him, trying to appease him and keep him in [fol. 44] good humor. He always wants to talk about the World War continually. After my return from the Army, I was not much inclined that way, but my brother was very much inclined to talk about his experiences in France.

PLAINTIFF'S EXHIBIT 2

Plaintiff's Exhibit #2, consisting of the records of the Adjutant General's Office relative to the plaintiff's service history, contained the following:

December 17, 1918. Admitted to U. S. Army General Hospital #19, by transfer from Debarkation Hospital #1, Ellis Island, New York. Clinical record (history): Inducted June 24, 1918. Sent to Camp Jackson, South Carolina. Sailed for France August 22, 1918. On September 22, 1918, while unloading vessel in Quartermaster's Department he hurt his back. Was sent to Camp Hospital #33, where they put on a plaster-paris jacket. About this same time he had irregular vomiting spells. Was then transferred to Base Hospital #65 a few weeks later. From there sailed to the States. At Ellis Island, not knowing how to dispose of him, he was sent to General Hospital #19, with a doubtful diagnosis of tuberculosis.

[fol. 45] Note.—Taken from Disability board, Camp Hosp. #[illegible]. G. S. #5, S. O. S. A. E. F. History—Entered hosp. Sept. 7th, 1918. Diagnosed influenza. Was working on dock for 2 days prior to entrance and had a chill and sprained back. Has always had lung trouble and is unable to do any walking. Any moving causes pain. Physical Examination: Negative, except he is very nervous. Lumbar spine very tender and processes of 2nd vertebrae seem to be out of line. Erector spinae very tense.

X-ray Examination: Shows no displacement of vertebrae, but some apparent decalcification of 1st and 2nd lumbar. Condition on admission: Feels weak. Slight cough and expectoration. Is nervous, troubled with pain in lumbar region, on moving about. These latter pains are transferred down the legs at times. Hyperacidity in stomach. Looks nervous, but not particularly sick. Present weight, 132½ lbs. Maximum, 158 lbs.; minimum, 130 lbs. Height, 5 feet, 8 inches. General condition: Fairly well nourished, but somewhat anaemic. Special senses: Conjunctivae, reddened. Glandular system: Apparently normal. Vascular system: Pulse regular, good tension, apparently normal in rate. Blood pressure: Systolic, 134. Diastolic, 94 P. 40. Heart: Apparently normal in size, position and rhythm. Genito-urinary system: No evidence of disturbance. Abdomen: Slightly distended. Liver: Apparently normal in size [fol. 46] and position. Spleen: Not palpable. Tenderness: None determined. Masses: None palpable. Nervous system: Reflexes apparently normal. Patient gives impressions of neurasthenia. Osseous system: Tenderness elicited over 1 to 4 lumbar vertebrae. Slight kyphosis present. Muscles and joints: Apparently normal. Diagnosis on transfer card: Tuberculosis pulmonary chronic inactive, right upper. In line of duty. Diagnosis of ward surgeon: Under observation for tuberculosis of spine. Line of duty.

December 20, 1918. X-ray findings: TB pos. TB chronic, fibroid. Recently active. Oldest lesion not determined. Definite lesions in both apices, 2nd int sp upper left, 2nd int sp upper right. Heart is small, pear-shaped, almost in midline. These abnormal densities have been diagnosed TB but may be result of a heart lesion. (Mitral Stenosis) If they are the result of TB they may be healed and have no clinical significance. No evidence of spinal trouble can be made out on these plates. Plates poor. No sputum obtainable.

December 20, 1918. Clinical History reviewed and patient examined. Symptoms largely subjective. Slight limitation of motion equal in all directions of lower back. Opinion [fol. 47] muscular strain—sacro iliac synchondrosis—probably recovering—without positive X-ray findings—with only tenderness over spine and area about, with definite history of trauma 3 mos. ago ("sudden sharp pain a giving way of something in the back on heavy lifting—immediate disability") can make diagnosis only of sacro-iliac strain.

December 21, 1918. Chest. Tuberculosis, pulmonary, chronic, inactive, bilateral, right upper lobe and left apex. Fibrinous adhesions left lower lobe.

January 1, 1919. Returned from furlough. Venereal examination negative. Patient seems in good condition, says he has some pain in back and in the right lower quadrant of the abdomen.

January 11, 1919. Does not retain any food. Has been placed on special diet.

January 16, 1919. Condition unchanged from previous week. Surgeons have been called in consultation. X-ray has been taken of the spine. Lungs negative. Venereal inspection negative.

February 10, 1919. Complains of stiff back, has bad cold, ordered culture of throat. Soreness in back of head and extending down the spine.

[fol. 48] February 8, 1919. Eats fairly well. No cough or expectoration.

February 15, 1919. Has recovered from stiffness in neck, also from cold. Eats and sleeps fairly well.

February 22, 1919. Conjunctiva show mild infection. Has mild laryngitis.

February 28, 1919. Progress satisfactory.

March 14, 1919. Progress satisfactory.

Declaration of soldier on report of physical examination of enlisted man prior to separation from service in the United States Army, dated March 27, 1919:

Question. Have you any reason to believe that at the present time you are suffering from the effects of any wound, injury, or disease, or that you have any disability, or impairment of health, whether or not incurred in the military service? Answer—no—(No signature.)

Certificate of examining surgeon:

I Certify That:

The soldier named above has this date been given a careful physical examination, and it is found that

He is physically and mentally sound with the following exceptions:

Tuberculosis pulmonary 3rd rib and 3rd dorsal spine up left side, chronic. In line of duty. Pes planus (2nd degree). Not in line of duty.

[fol. 49] The wound, injury, or disease is likely to result in death or disability. In my opinion the wound, injury, or disease did originate in the line of duty in the military service of the United States. In view of occupation he is 20 per cent disabled.

Evidence For Defendant

Dr. C. H. Young, a witness for the defendant, testified:

I have been practicing medicine in Anderson, South Carolina, since 1913. I am a medical examiner for the Pacific Mutual Life Insurance Company, and was in 1925. That is my signature on an examination report of James Haskell Halliday, dated July 15, 1925, and it indicates that I made the examination in my office here in Anderson. He came to my office. I have no independent recollection of the man. The report indicates that I asked the questions there set out, and I obtained the answers from the plaintiff, as indicated, and wrote them down myself. The physical findings are those which I reported as a result of my examination. As to whether the examination was as thorough as those questions would indicate, the answer is just that and nothing more.

[fol. 50] I actually examined him to find out whether or not those answers were correct and I put the answers down in my own handwriting. The statement at the bottom of the report is in my handwriting, as follows: "Applicant has lost no time from work past 5 yrs. I find nothing abnormal in back or elsewhere. C. H. Young." I recommended him for the life insurance and recommended the risk.

The form does not indicate anything at all in the nature of a mental examination. If there had been anything noticeable in his conduct from a mental or nervous standpoint, if there had been anything manifested, I would have noted it, yes, sir. It was the usual life insurance examination and I thought he was a good risk for life insurance, and that is all I recommended. The form indicates that Halliday himself signed his own statements in my presence. That is customary. It indicates that he signed it before me and after answering these questions.

Defendant's Exhibits 1 & 2

Defendant's Exhibits #1 and #2, consisting of the plaintiff's application for life insurance with the Pacific Mutual Life Insurance Company and attached Medical Examiner's Report, showed the following:

[fol. 51] The plaintiff stated in his application that he was 32 years old; that he was a farmer and land owner and had been so for life; that he had no other occupation; that he was applying for a $3,000 ordinary life policy with the provision for permanent total disability benefits of $45.00; that he had no other life insurance then in force.

A portion entitled "For Home Office Endorsements Only" contained a statement in long hand that the number 5½, referring to the permanent total disability benefit appearing above, is as follows: "Amount of Permanent Total Disability Benefits—None."

A part entitled "Questions To Be Asked By The Medical Examiner" contained answers over the plaintiff's signature to the effect that the applicant had never changed, or been advised to change, his occupation or residence to benefit his health; that he did not use alcoholic beverages or drugs and had been a total abstainer all his life; that no one in his family had committed suicide or suffered from cancer, epilepsy or insanity; that no one in his family or immediate household had ever died of consumption or any other contagious disease; that no insurance company has ever refused, limited, or postponed his application; that he had [fol. 52] never applied for insurance without getting the policy; that he had no other application then pending; that he was receiving pension or Government compensation in the amount of $40.00 per month and had been for the past two years, and had received $145.00 a month for three years; that he had never been treated for, among other things, mental derangement, shortness of breath, chronic cough, spitting of blood, influenza, pneumonia, pleurisy, bronchitis, tuberculosis, or nervous prostration; that he had given full information about each of the foregoing questions; that he had consulted physicians or practitioners during the preceding seven years for tonsillitis, injury to back while in the Army, stating that he had been in a plaster cast for two months; that the X-ray had been negative and the injury had been considered sacro-iliac strain; that his weight had

neither increased or diminished during the preceding year; and that he was at the time of the signing of the application in good health.

The "Medical Examiner's Report" reveals that the applicant was a stranger to the examiner; that he was 5 feet, 7 inches tall, weighed 132 lbs., his chest measured 32 inches [fol. 53] on expiration and 36 inches on inspiration; that his general appearance indicated perfect health; that he was not deformed or lame; that there was no impairment of sight or hearing; that the respiratory murmur and percussion note was normal over all parts of both lungs; that there was no indication of disease of the heart or blood vessels, systolic blood pressure, 116, diastolic, 70; pulse rate while seated, 70; pulse did not intermit or become irregular or unequal; there was no evidence of arteriosclerosis or other degenerative changes; his temperature was 98; that the examiner did not "discover upon examination or inquiry any evidence of disease or functional derangement, past or present, of the brain or nervous system"; that there was no undue hazard to life or health from the applicant's occupation, residence, or pastime which might affect the risk as to life, accident, or health insurance; that the examiner knew nothing in connection with the moral character, physical condition, or past health record not already detailed which would affect the applicant's insurability; that the examiner had reviewed all answers and initialed all changes on both sides of the blank; and that he recommended the risk. At the bottom of the page appeared the following:

[fol. 54] "Notice to Medical Examiner.—If you know of any facts affecting the risk not covered by your report, please state them below, or send a confidential letter direct to the Medical Department of The Pacific Mutual Life Insurance Company, Los Angeles, California. Applicant has lost no time from work past 5 yrs. I find nothing abnormal in back or elsewhere. C. H. Young."

Cross-examination of Dr. Young:

If the applicant had told me that he had been in a Government hospital for pulmonary tuberculosis, and had remained there over a period of time from August 1919 to April 1920, for tuberculosis, I would have at least mentioned that in my remarks on the examination report and let the

insurance company decide the matter. I made no mental examination at all. I don't know whether or not the policy was finally issued to plaintiff. You cannot always determine from talking to a man on the first examination whether he is mentally all right. It requires more than that, yes, sir. I have no recollection of seeing the man before July 15, 1925. If I had been treating him from the time he was a boy and had been his family doctor and after his return from France had seen a change in him and talked with [fol. 55] him from time to time I would have been in a better position to make an examination as to his mental condition, yes, sir. It is not unusual to examine a man physically and to overlook the mental side, that is quite right. Very often, even over a long period of observation the patient can conceal the fact that there is abnormality so far as mental condition is concerned. They are susceptible to doing that in dementia praecox, and so on, yes, sir.

Q. In other words, they are the smartest people in the world?

A. Yes, sir, they are:

Mr. Doyle: We object to that as being a hypothetical question as to dementia praecox. Therefore, his answer to such question is incompetent.

The Court: I think your objection is correct. I think Mr. Wise could inquire of the witness whether or not certain symptoms testified to would lead a medical man to conclude that he might be suffering from dementia praecox.

Mr. Doyle: But since there is no evidence of dementia praecox, the question elicits an incompetent answer.

The Court: On that ground, I think the objection should be sustained.

A mental examination was not made at all, no, sir. I know nothing about this boy except from hearsay.

[fol. 56] Emphysema just means that a good many of the individual vesicles of the lung have formed one large vesicle, and the smaller vesicles are ruptured. It is in larger spaces. There is more air in the lung and it is harder to get rid of the air as well as normally. Not referring to this case, as to whether that affects a man doing physical work, it does to some extent, depending on the man. A patient would have to be under my observation for a period of time to determine it, yes, sir.

Redirect examination of Dr. Young:

Q. Doctor, I know your examination as a casual examination, but you will note this question: "Do you discover upon examination or inquiry any evidence of disease or functional derangement"—What is meant by functional derangement?

A. The way he breathes; talking about his respiration.

Q. In other words, that question was: "Do you discover upon examination or inquiry any evidence of disease or functional derangement, past or present, of the brain or nervous system? If so, state particulars." Now, in such examination as you made, you directed your examination to that question as much as you could?

A. Yes, sir.

[fol. 57] Q. And you found none?

A. No, sir.

Q. At that examination, you did direct your examination to that question as much as time would permit and you found none?

A. That is right.

Recross-examination of Dr. Young:

Q. You were not especially looking for it were you?

Mr. Doyle: The question asked him to.

J. W. Dickson, a witness for the defendant, testified:

I am the general agent of the Pacific Mutual Life Insurance Company of California, in Anderson, South Carolina, and I sometimes write insurance myself, as well as the agents. I solicited Mr. Halliday's insurance application and wrote part of the agent's report, and the cashier in my office completed it for me. I talked to Mr. Halliday in 1925. As well as I recall, a mutual friend brought him to the office. As to whether, as a layman, I thought at the time he was a proper subject for insurance, I only met him that day and had never known him prior to that. I didn't notice anything unusual about Mr. Halliday that day and pursuant to that I sent him to Dr. Young for examination. They [fol. 58] issued a sub-standard policy. It is a policy rated up some, according to the nature of the impairment. They didn't issue any type of disability. He applied for dis-

ability but it was not issued. As to how much it was rated up, I don't recall that rating at all. According to the practice of the office, that rating up would depend on what the doctor found on examination, and on the doctor's statement.

Cross-examination of Mr. Dickson:

Plaintiff never paid for the policy. It was issued substandard and it was never put in force, so I never made any money on it. I don't know why he was not given the disability insurance. The company passed on that. I don't know how the Government found out about this application for insurance. That was done direct to my home office and not to me.

Redirect examination of Mr. Dickson:

I came here pursuant to a subpoena, and would not have come otherwise.

Recross-examination of Mr. Dickson:

I haven't tried to sell him insurance since.

Redirect examination of Mr. Dickson:

I was lik wise asked to produce these records.

[fol. 59] DEFENDANT'S EXHIBIT 3

Defendant's Exhibit #3 consisted of a letter from the plaintiff to the Bureau of War Risk Insurance, dated at Johnson City, Tennessee, on June 18, 1920, which reads as follows:

I hereby apply for the necessary form to be filled out by me in order that I may reinstate my insurance that was granted me by the bureau of War Risk Insurance. Upon receiving this you may consider it in force beginning July 1*th*, 1920. Soon as I receive my compensation check for the month of May 1920 will forward the necessary premium on Ten Thousand dollars. Thanking you for the past & the future I beg to remain

Yours truly, James Haskell Halliday, Vocational School, Soldiers Home, Johnson City, Tenn.

Defendant's Motion for Directed Verdict

Mr. Doyle: I will make this motion. The defendant moves the Court for a directed verdict in favor of the defendant upon the following grounds: (1) That the plaintiff has not made out a prima facie case; (2) That there is no substantial evidence upon which the jury can reasonably find that the insured became permanently and totally disabled as alleged in the complaint or at any time while the insurance, which is the subject of this action, was in force by the payment of [fol. 60] premiums; and (3) That the statute of limitations has barred the bringing of this action.

The Court: I think it is a case that ought to be submitted to the jury under the evidence here, the doctors' testimony and other witnesses stating his condition before entering the service and his condition immediately upon his return from France, and I think I will have to submit it to the jury. The motion is overruled and an exception is allowed.

Charge to Jury

The court instructed the jury as follows:

Mr. Foreman and Gentlemen of the Jury, the Court will now charge you as to the law applicable to this case and state to you the issues that are to be determined and decided by you in this case; and, in addition to that, the Court can, if he sees fit, make observations on the evidence. I think it proper to tell you that in the State Courts the Judges are precluded from making observations on the evidence or statements thereabout or conclusions, but in the Federal Court the Judges are permitted to state their views on the evidence. You are not bound by that. You must make [fol. 61] your own conclusions as to the facts brought out on the witness stand under the law as the Court gives it to you, but the Court may from time to time, as it thinks proper to do so, make certain observations as to the evidence. Let me thank you gentlemen for your coming here and serving as jurors in this case. You have listened patiently to the evidence and to the discussions that have come up in the trial of the case as to the admissibility of evidence and other matters that have come before the Court for its consideration; and now you have reached the point where your duties are about completed, and after the Court completes its charge, you will retire to your room

and find your verdict. You have had the help of two outstanding lawyers in this case. Mr. Wise, counsel for the plaintiff, is the former head of the American Legion in South Carolina. Mr. Doyle, counsel for the Government, also is the former head of the American Legion in South Carolina. They are outstanding lawyers and know the principles applicable to a case of this kind probably better than any other lawyers in the State and the Court is appreciative of their help in this matter, and I know that you as jurors have been enlightened by their arguments in the matter. In approaching this charge, let me admonish you that you are approaching the decision in this case not with any feeling of sympathy toward the plaintiff. The plaintiff might be in a decrepit condition mentally or otherwise, but you cannot let sympathy sway you in a matter of this kind. On the other hand, because the defendant is the Government in this case, you cannot let that sway [fol. 62] you. It is just as if this matter was on a contract for the purchase of a piece of land. There is not a bit of difference in this matter than if it was a contract of that kind. The soldiers in the World War carried insurance and paid for it, and some are still paying for it. The Government worked out this plan. You did not have to take a physical examination. When you went in the army and you desired to take out this insurance, you made an application and that was the end of it. Your name was entered on the roll, it was kept there, and there was deducted from your wages monthly the premium necessary to pay for this insurance which was carried. So you approach the consideration of this case without sympathy for the plaintiff and without sympathy for the defendant. It is not the Government; it is a contract of insurance in the true sense of the word, and an insurer just as much as an insurance company. That money has been set aside every year. It is kept in a separate fund. It was calculated that upon the charge of so much money, they could insure a man thirty years old, twenty-two years old, or twenty years old. That is the manner in which you will approach the case, without sympathy for the plaintiff or for the defendant, and under your oath you will find the truth and do your duty under the law that the Court will charge is applicable. Now, the plaintiff comes into court and I think in Paragraph Three of the complaint it is alleged that he

had this policy. I charge you that it was a $10,000.00 policy, and in case of permanent and total disability while the [fol. 63] policy was in full force and effect, he was to receive the sum of $57.50 per month thereafter, right up to now. This complaint says that while the plaintiff was serving in the Army of the United States he became totally and permanently disabled by reason of diseases and infirmities so that from the 2nd day of April, 1919, (remember that is your date) he was totally and permanently disabled to the extent contemplated by the contract of War Risk Insurance under the Acts of Congress and regulations relating thereto and that on account of said disability, no premiums were due to have been paid on the said contract of insurance from the date of his disability, and that the said contract was at that time and is at this time in full force and effect. The defendant, the Government, denies that and says that he was not disabled while the policy was in full force and effect, and denies that he is entitled to anything. Now, on those issues, you are to find your verdict, you are to reach a conclusion, you are to say who is entitled to your verdict in this case, the plaintiff or the defendant. Now, the plaintiff must come into court and prove these allegations by the greater weight of the evidence. By the greater weight of the evidence, I charge you that that means the proportion of the evidence that carries conviction to your minds as reasonably prudent men in the belief that the plaintiff has proved his case. They use this illustration as an easy way to carry to the minds of the jury what the Court is attempting to say. Shut your eyes, as it were, and place the evidence on the [fol. 64] scales, and whichever side goes down, that is the greater weight of the evidence. If the plaintiff's evidence is such that it proves to your minds by the greater weight thereof that the allegations have been proven, then you must find for the plaintiff. If the evidence fails to prove that, then you must find for the defendant. The greater weight is the portion of the evidence that the plaintiff must bring to you in order to recover. Now, on the question of the issues here, I must charge you what is meant in law by permanent and total disability. Now, remember that the date for your consideration is the 2nd day of April, 1919, which was the date of discharge in this case. Automatically after that, if he was permanently and totally disabled, there

was no need to pay any further premiums. You need not worry about the premiums, but consider whether or not while in the army the plaintiff was permanently and totally disabled. Now, in considering what is permanent and total disability, the Government of the United States, operating this department of the Government providing for the World War Veterans, has in its Regulation Number 11 defined what permanent and total disability means in the opinion of the Government, the defendant here. It defines total disability as any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation, without [fol. 65] serious impairment to either body or mind. And it is to be deemed to be permanent when found on conditions rendering it reasonably certain that it will continue throughout the life of the person so suffering from it. That means, to go just a little further—because that is perfectly clear,

Any impairment of mind or body from April 2nd, 1919; whether or not that person became so disabled by such impairment of mind or body that he was thereafter unable to follow continuously any substantially gainful occupation, without serious impairment to either mind or body. Suppose he tried to follow a substantially gainful occupation and the doctor told him, "If you do that, it is going to seriously impair your body or mind." I think it proper to call your attention to this, that the only testimony on that point was by Dr. Land. He said that in his opinion there would have been a complete collapse of mind and body if he had worked. You have to take that into consideration. That is the only medical evidence on that point in the case, and I think it proper and appropriate to call that to your attention. Now, then, as to what is the further rule from a legal standpoint from the decisions. Remember that the contract in this case insured against two things: death and disability. Well, there was no death. In case of death, there would [fol. 66] have been paid $10,000.00 if death had occurred while the policy was in force. So in the death feature you are not concerned, because the insured is still alive. The only issue is whether or not the insured became disabled on or before the 2nd day of April, 1919. When the contract of insurance lapsed, it was reinstated, and it finally lapsed in 1920. I do not think it is necessary to be considered in this case, but you could consider up to the 20th day of Oc-

tober, 1920; whether or not the disability occurred up to that time. There was a period there that it was paid through April 30th, 1919 by virtue of the thirty days of grace. It lapsed on August 1st, 1920. He kept it up until then. Then it was reinstated and premiums were paid through September 20th. The final lapse was October 20th, 1920. You can consider the evidence through October 20th, 1920, as to whether or not the disability occurred up to that time, but the prime date is April 2nd, 1919, because that is what the complaint alleges although the other could be considered. Now, I charge you that it is proper for you to take into consideration the evidence which you have heard relating to the physical and mental condition of the insured; that is, from April 2nd, 1919, which is the date that they allege, and since, because they must continue that through the years up to 1935. All of this evidence as to his condition [fol. 67] in later years, however, is to be considered by you for the purpose of determining whether the insured became in fact permanently and totally disabled on or before April 2nd, 1919, or later in August, September, or October, 1920. If you are satisfied from the preponderance or greater weight of the evidence that the insured at any time before the 2nd day of April, 1919, or before August, September, or October, 1920, was not totally disabled, you must find and return a verdict for the defendant in this case. On the other hand, if you find that he has been totally and permanently disabled since that date, you should take that fact into consideration. I want to charge you as to what some of our Courts have held and defined as permanent and total disability. One of the outstanding cases holds, and I so charge you, that the phrase permanent and total disability in a war risk insurance policy should be construed reasonably and not unreasonably. You Gentlemen of the Jury must act reasonably in your consideration of the facts, which are to be construed reasonably, having regard to all the circumstances. Permanent disability, as used in war risk insurance policies, means that which is continuous as opposed to that which is temporary. The phrase permanent and total disability, as used in a war risk insurance policy, does not mean helplessness or complete disability, but in- [fol. 68] cludes more than that which is partial. Permanent and total disability, says another outstanding decision, is a disability which permanently precludes the plaintiff from following any substantially gainful occupation. I

think I have covered pretty largely the meaning and intention of the words permanent and total disability, and the construction given by the Government in its own bulletins, by the Courts of the State, and my own judgment of what constitutes permanent and total disability. Now, as I stated, it must begin while he was in the service or in that period which I just described to you up to October 20th, 1920, and he must show by the greater weight of the evidence that such permanent and total disability has existed. Now, that must continue through the years down to December, 1935. You will recall that this Court eliminated any testimony beyond December, 1935, because at that time he was judicially declared to be of unsound mind, and I charge you now that the solemn judgment of a court of this land, pursuant to the statutes of South Carolina, found and held this plaintiff to be insane and of unsound mind and had a committee, which is sometimes called a guardian, appointed for him to transact his business, and neither you nor I nor anyone else can go beyond a solemn judgment of a court of South Carolina declaring him to be insane. From that time [fol. 69] on he was permanently and totally disabled because of those facts, and the presumption is that he will continue so until his life ends, unless and until by some proceeding in that court or by action of the State Hospital for the Insane he is declared to be of sound mind, and that is also by a proceeding in the courts of South Carolina. Therefore, you need not consider for one minute whether after that he was totally and permanently disabled, because I charge you as a matter of law that he was. Now, Mr. Foreman and Gentlemen of the Jury, I think that covers pretty largely all the matters of law that I can give you: an explanation of the issues here and the law applicable to the case. You are going to recall that the burden of proof is on the plaintiff through the case by the greater weight of the evidence. You will recall that if that proof is here by the greater weight of the evidence as shown by the plaintiff in her case or his case, then you must find for the plaintiff. If not, you must find for the defendant. You must remember that the date alleged is the 2nd day of April, 1919, and if you find for the plaintiff, you will take this sheet of paper at the top of which you will find the form of verdict: We, the jury, find for the plaintiff and fix the date of his permanent and total disability from and after—you can, if you desire, say [fol. 70] the 2nd day of April, 1919, or you could say some

date in either August, September, or October, 1935, because the policy was in force in those three months too, but you can fix the date if you find for the plaintiff. If you find for the defendant, you will find the place here, and you will say: We, the jury, find for the defendant. In either case, sign your name as Foreman. Are there any other suggestions or any exceptions to the charge?

Mr. Doyle: Your Honor, the Government will except to that portion of your Honor's charge that the adjudication of the Probate Court in 1935 precludes further inquiry into the question of permanent and total disability, because I know of no decision to that effect.

The Court: I am glad for you to do that, because it is a very important question. I am glad for an exception to be taken and allowed.

Mr. Wise: May it please the Court, this regulation Number 11, I think where the fact is that in 1935 he was adjudicated to be insane, that might go as a question for the jury as to the latter part of that definition that it is deemed to be permanent. I don't think they can find a verdict unless it is deemed to be permanent. The fact that he did have this committeeship would make it reasonably certain [fol. 71] that it would continue. I would like that explained to the jury.

The Court: Under Regulation Number 11 of the Government, they have defined a case to be permanent when found on conditions rendering it reasonably certain that it will continue throughout the life of the person so suffering from it. That, of course, was covered by my general charge and by the specific language I used. I charge you that until the judgment of the Probate Court of Anderson County is relieved by some proceeding directly in that Court or otherwise that would find that he was not permanently and totally disabled, as a matter of law he is permanently and totally disabled and it will continue until death; that he is permanently and totally disabled and that it will continue until his death.

Mr. Doyle: I may be wrong, but is there also a presumption that a man is sane until he is proven insane?

The Court: I don't think there is any such presumption. I have never heard of it. The plaintiff has made the issue here and you joined issue here on that very point, and that is your evidence to be presented to the jury.

Mr. Doyle: But that is some evidence that the jury may take into consideration.

The Court: This Court will not charge that that is some evidence. The plaintiff does not allege insanity in his com-[fol. 72] plaint. He alleges that by reason of disease and infirmities he was permanently and totally disabled from the 2nd day of April, 1919.

Mr. Doyle: Yes, sir, but he has argued to the jury.

The Court: He has argued it according to the way the doctors testified and he has attempted to prove it. I think those issues are clear. I think you Gentlemen of the Jury understand them. It is very simply boiled down in the final analysis of the case. You may take this record, the complaint and the answer, and write your verdict as you find it on the sheet of paper which I will put there. You can retire to your room Gentlemen, and when you reach a verdict you can advise the Marshal and he will advise the Court.

VERDICT

The jury retires. After deliberating, the following verdict is returned by the jury: We, the jury, find for the plaintiff and fix the date of his permanent and total disability from and after the 2nd day of April, 1919.

The jury is excused.

A motion for a new trial is noted by Mr. Doyle.

[fol. 73] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO THE STATEMENT OF THE EVIDENCE

It is hereby agreed and stipulated by and between the undersigned counsel for appellant and appellee herein that the foregoing statement of the evidence, including pages numbered 6 to 72 of this transcript of the record on appeal, comprises a true, full, and complete statement of all of the evidence introduced at the trial of this action and of the court's charge to the jury, necessary for consideration of the questions involved on this appeal.

This 2 day of Oct. 1940.

O. H. Doyle, United States Attorney, Counsel for Appellant. R. K. Wise, Counsel for Appellee.

[fol. 74] IN UNITED STATES DISTRICT COURT

ORDER OVERRULING MOTION FOR A NEW TRIAL—Filed February 20, 1940

This case was tried before me at Anderson, South Carolina, on November 30, 1939. The plaintiff was represented by R. K. Wise, Esquire, of Columbia, S. C., and the defendant by O. H. Doyle, United States Attorney, and E. P. Riley, Assistant United States Attorney, and the trial resulted in a verdict for the plaintiff. A motion for a new trial was made and was argued before me in Columbia, South Carolina, on February 26, 1940.

I am of the opinion that there was ample evidence to go to the jury in this case. The Government records showed that the veteran was not in good physical condition when he was discharged from the Army. He was given vocational training at Waynesville, N. C., and at the University of Georgia, but the testimony was and the record showed that his training was frequently interrupted on account of his physical and mental condition. The veteran's wife, who is his committee, and who was a school teacher prior to their marriage in 1921, made a very impressive witness. She testified that the veteran was in bad physical condition and extremely nervous even before their marriage in 1921; [fol. 75] that soon after their marriage she discovered that the veteran was mentally unbalanced, that he was suspicious of her and all the neighbors, was afraid that someone would poison him, and he threatened to kill her and all of the children and commit suicide. Several of the neighbors testified that the veteran appeared to be sick, was very contentious and suspicious, and was on bad terms with all of his neighbors.

Dr. J. N. Land testified that he had known the veteran since he was a boy; that he had been the physician of his mother's family before the War and had seen the veteran quite regularly since he returned from the Army; that he had considered him both physically and mentally unfit for work since his discharge; and that any sustained effort would, in his opinion, have brought about a complete collapse of the veteran physically and mentally.

The Government offered little testimony to offset the plaintiff's case other than the testimony of Dr. C. H. Young.

who examined and passed the veteran for a life insurance policy. But, on cross examination, Dr. Young admitted that he had made no mental examination of the veteran and that in such an examination as he made it would not be unusual for him to overlook the veteran's mental condition, [fol. 76] and that one might easily conceal the fact that he was mentally deranged on such an examination. The Agent who represented the insurance company for which Dr. Young had made the examination testified that a sub-standard policy was issued to the veteran and that it was not accepted by him.

I am of the opinion that the jury returned a proper verdict in this case and I am convinced that if a new trial were granted, another jury would come to the same conclusion. It is, therefore,

Ordered, That the motion for a new trial be and the same is hereby overruled.

(Signed) Alva M. Lumpkin, United States District Judge.

Columbia, S. C., February 27, 1940.

[fol. 77] IN UNITED STATES DISTRICT COURT

JUDGMENT—Filed April 18, 1940

This cause came on regularly to be heard on November 30, 1939; R. K. Wise, Esquire, appearing for the plaintiff; Honorable Oscar H. Doyle, United States Attorney for the Western District of South Carolina, attorney for defendant; that a jury of twelve persons was regularly impaneled and sworn to try the said cause. Witnesses on the part of plaintiff and defendant were sworn and examined with reference to the action herein upon a certificate of insurance issued by the defendant to James H. Halliday, a soldier of the World War, providing that in the event of his permanent and total disability while his insurance was in force, that he would be paid by the defendant the sum of Fifty Seven and 50/100 ($57.50) Dollars per month throughout the period of such disability; that after hearing the evidence and the instructions of the Court the jury retired to consider their verdict,

and subsequently returned into Court their verdict in words and figures as follows: to wit:

"We the Jury find for the plaintiff and fix the date of his permanent and total disability, from and after April 2, 1919.
[fol. 78] (S.) Mark Toney, Foreman.

Dated: November 30, 1939."

And the Court having fixed plaintiff's attorney fees in the amount of ten percentum of the insurance sued upon and involved in this action. Therefore, on motion of R. K. Wise, attorney for plaintiff:

It Is Ordered, Adjudged And Decreed that the plaintiff have judgment against the defendant for monthly installments at the rate of Fifty Seven and 50/100 ($57.50) Dollars, for each and every month beginning April 2, 1919, up to and including November 2, 1939, monthly anniversary date immediately preceeding the trial of said cause of action.

And It Is Further Ordered, Adjudged And Decreed that the defendant, the United States of America, deduct ten percentum (10%) of the amount of insurance sued upon and involved in this action and pay the same to R. K. Wise, Columbia, S. C., plaintiff's attorney, for his services rendered before this Court, payable at the rate of one-tenth (1/10) of all back payments and one-tenth (1/10) of all future payments which may hereafter become due pursuant to this judgment, said amounts to be paid by the defendant to the [fol. 79] said R. K. Wise out of any payments to be made to James H. Halliday, a person non compos mentis, his Committee, beneficiary or estate, in the event of his death before Two Hundred and Forty (240) of said monthly installments have been paid.

Alva M. Lumpkin, United States District Judge.

Signed: April 18th, 1940.

Approved as to Form.

O. H. Doyle, United States Attorney, For the Defendant.

IN UNITED STATES DISTRICT COURT

NOTICE OF APPEAL—Filed July 16, 1940

Notice is hereby given that the United States of America, defendant above named, hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the final Judgment entered in this action on April 18, 1940.

(Signed) O. H. Doyle, United States Attorney, Attorney for Appellant, United States of America.

Greenville, S. C., July 16, 1940.

[fol. 80] IN UNITED STATES DISTRICT COURT

APPELLANT'S STATEMENT OF POINTS ON APPEAL—Filed Oct. 10, 1940

To: R. K. Wise, Esquire,
Attorney for the Plaintiff-Appellee herein

You Will Please Take Notice That the defendant herein will ask the United States Circuit Court of Appeals for the Fourth Circuit to reverse the judgment heretofore entered in this action upon the following grounds, to-wit:

I

Because the District Court erred in failing and refusing to grant defendant's motion for a directed verdict made at the close of all the evidence upon the ground that there was no substantial evidence that the plaintiff was permanently totally disabled as alleged. (R. 59-60.)

II

Because the District Court erred in its ruling, over the defendant's objection, excluding all evidence relating to the condition of the insured subsequent to December 1935. (R. 12-19.)

III

Because the District Court erred in instructing the jury, over the defendant's objection made in the presence of the jury, that—

[fol. 81] * * * I charge you now that the solemn judgment of a court of this land, pursuant to the statutes of

South Carolina, found and held this plaintiff to be insane and of unsound mind and had a committee, which is sometimes called a guardian, appointed for him to transact his business, and neither you nor I nor anyone else can go beyond a solemn judgment of a court of South Carolina declaring him to be insane. From that time on he was permanently and totally disabled because of those facts, and the presumption is that he will continue so until his life ends, unless and until by some proceeding in that court or by action of the State Hospital for the Insane he is declared to be of sound mind, and that is also by a proceeding in the courts of South Carolina. Therefore, you need not consider for one minute whether after that he was totally and permanently disabled, because I charge you as a matter of law that he was. (R. 68-69, 70-72.)

Oscar H. Doyle, United States Attorney, By ——, Assistant United States Attorney, Counsel for Appellant.

September 1940.

Service accepted this 2 day of October 1940.
R. K. Wise, Attorney for Plaintiff-Appellee.

[fols. 82-83] In United States District Court

Order Extending Time for Docketing and Filing Record on Appeal—Filed Aug. 16, 1940

Upon motion of O. H. Doyle, United States Attorney for the Western District of South Carolina, at the request of the Director, Bureau of War Risk Litigation.

It Is Ordered: That the time for docketing and filing record on appeal in the above entitled case be, and the same is hereby, extended for a period of fifty days from August 25, 1940.

Alva M. Lumpkin, U. S. District Judge.

Columbia, S. C., August 15, 1940.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 84] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4714

UNITED STATES OF AMERICA, Appellant,

versus

JAMES H. HALLIDAY, a Person Non Compos Mentis, by His Committee, ANNIE HALLIDAY, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina, at Anderson

DOCKET ENTRIES

October 12, 1940, the transcript of record is filed and the cause docketed.

Same day, the original exhibits are certified up.

October 15, 1940, the appearance of O. H. Doyle, U. S. Attorney, is entered for the appellant.

Same day, order extending the time for a period of fifty days from August 25, 1940, for docketing and filing record on appeal is filed.

October 17, 1940, the appearance of Julius C. Martin, Director, Bureau of War Risk Litigation; Wilbur C. Pickett, Special Assistant to the Attorney General, and Fendall Marbury, Special Attorney, Department of Justice, is entered for the appellant.

October 21, 1940, affidavit of appellee as to poverty is filed.

[fol. 85] ORDER PERMITTING APPELLEE TO DEFEND APPEAL *in Forma Pauperis*—Filed October 21, 1940

Upon the Application and Affidavit of the Appellee, by R. K. Wise, his attorney, for permission to defend the appeal in the above entitled case in this Court *in forma pauperis.*

It Is Ordered that the appellee be, and he is hereby permitted to defend his appeal in the above case in this Court *in forma pauperis*, and he is further permitted to file six

typewritten copies of his brief instead of twenty-five printed copies as required by the rules of this Court.

October 21, 1940.

John J. Parker, Senior Circuit Judge.

Same day, to-wit, October 21, 1940, the appearance of R. K. Wise is entered for the appellee.

October 22, 1940, stipulation as to the time for the filing of the respective briefs is filed.

Same day, notice of parts of the record appellant proposes to print with its brief is filed. Service accepted.

November 4, 1940, the appearance of Warren E. Miller is entered for the appellee.

November 8, 1940, brief on behalf of appellant is filed.

Same day, twenty-five copies of supplement to appellant's brief are filed.

[fol. 86] November 18, 1940, brief on behalf of appellee is filed.

ARGUMENT OF CAUSE

November 23, 1940, (November term, 1940) cause came on to be heard before Soper and Dobie, Circuit Judges, and Chesnut, District Judge, and was argued by counsel and submitted.

[fol. 87] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 4714

UNITED STATES OF AMERICA, Appellant,

versus

JAMES H. HALLIDAY, a Person Non Compos Mentis, by His Committee, ANNIE HALLIDAY, Appellee

Appeal from the District Court of the United States for Western District of South Carolina, at Anderson

(Argued November 23, 1940. Decided January 9, 1941)

Before Soper and Dobie, Circuit Judges, and Chesnut, District Judge

Fendall Marbury, Attorney, Department of Justice, and Oscar H. Doyle, U. S. Attorney, (Julius C. Martin, Direc-

tor, Bureau of War Risk Litigation; and Wilbur C. Pickett, Special Assistant to the Attorney General, on brief) for Appellant, and Warren E. Miller and R. K. Wise for Appellee.

OPINION—Filed January 9, 1941

[fol. 88] DOBIE, Circuit Judge:

This was an action on a war risk insurance policy, brought by James H. Halliday (hereinafter called the insured), who sued through his Committee, Annie Halliday, to recover total permanent disability benefits under his term policy, which was issued between June 23, 1918, and April 2, 1919, while he was in the military service of the United States.

In his complaint, filed November 20, 1936, insured alleged that he had been totally and permanently disabled since April 2, 1919, the date of his discharge from the army. Insured's policy, which had lapsed for non-payment of premiums, was reinstated on August 1, 1920, and premiums were paid which carried the policy, including the grace period, to October 31, 1920. Accordingly, the issue submitted to the jury was whether insured was totally and permanently disabled before October 31, 1920.

At the close of the case, the Government moved the court to direct a verdict in its favor upon the ground that there was no substantial evidence that the plaintiff was permanently and substantially disabled at any time while the insurance was in force. This motion was overruled by the court. Thereafter, the jury rendered a verdict for the insured and fixed April 2, 1919, the date of the insured's discharge from the army, as the date of his total and permanent disability. Judgment was accordingly entered in favor of the insured. The Government strenuously objected to some of the instructions given by the trial judge and to certain of his rulings on the admissibility of evidence. Since we believe that the lower court should have directed a verdict in favor of the Government on the ground that there was not substantial evidence of total and permanent disability to go to the jury, it is not essential that we pass on the other questions involved in this case.

After a careful survey of the record, we are forced to the conclusion that there was no substantial evidence to prove [fol. 89] that the insured was totally and permanently dis-

abled on or before October 31, 1920. We therefore proceed to a brief survey of this evidence.

Insured introduced only one medical witness, Dr. J. N. Land. Dr. Land did testify:

"I would not have advised him to do any work since he has been out of the Army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically. He is not physically in good shape, and is mentally in bad shape. When he got out of the Army I didn't hold any hope for his recovery, a man in his condition will go from bad to worse. I think he has gradually progressed since he came out of the Army. I was instrumental in having a committee appointed for him."

This testimony, however, has little probative force. Dr. Land testified that he had not examined the insured "physically until about six years ago",—more than thirteen years after the expiration of the policy. He further stated that he had seen the insured only a very few times before that date: "I would say I saw the man at least two or three times a year, possibly more." As Dr. Land testified, he would see the insured on the streets or in a drug store. On these occasions when the insured sought help and advice of the doctor, the doctor stated: "He was not my patient. I simply shunted him off and got away from him as best I could." In other words, Dr. Land did not see the insured professionally on the few occasions when Dr. Land came into contact with the insured, prior to the doctor's employment by the insured six years before the trial. Dr. Land testified further that insured was neurasthenic and a hypochondriac; but he admitted that he was a general practitioner and in no sense an expert or specialist in mental diseases.

Insured's wife testified that she had married him in April, 1921. She testified further that prior to their mar- [fol. 90] riage, insured had come to see her from his home, about eighteen miles away, or from the hospital where he was taking treatment. Insured, according to his wife's testimony, was at the time of their marriage, far from well and complained constantly of his stomach, heart and kidneys. She said, too, that farm work upset his nerves and stomach. She did marry him, however, and bore him four chil-

dren. Two of insured's brothers also testified on his behalf. The testimony of the brothers was far from convincing on the question of insured's total and permanent disability. One brother testified that the insured was never "able to make a full week". The other brother testified that he had "not seen him (insured) do any successful work since he was discharged".

There were several other lay witnesses testifying for insured but the testimony of these witnesses was utterly lacking in definiteness. Thus, Mr. Leverett testified: "When he (insured) returned, he seemed to be a man that didn't have a grip on himself. It was nervousness of some kind." Mr. Jackson stated: "I would say that for the last ten or twelve years he has seemed to be very nervous * * * I have had no opportunity to see him at his farm nor to know whether he did any work." Other lay witnesses testified along the same general line.

There were numerous examinations of insured by government physicians from April 12, 1920, to April 11, 1935. These reports showed that insured's tuberculosis had been arrested and no note was made in these reports of any positive mental or nervous disorder on the part of insured until February 14, 1921. In one of these reports, dated December 17, 1924, we find: "Mental Examination: Patient answers questions readily and accurately. Orientation and memory good. Insight and judgment good. There is no history or evidence of any psychosis. Findings of Board: It is our opinion that claimant has an industrial disability of fifteen (15) per cent from tuberculosis, chronic pulmo- [fol. 91] nary, minimal involvement, apparently arrested. There is no N. P. (neuro psychopathic) disability".

In 1925, insured applied for an ordinary life insurance policy, with a provision for total permanent disability benefits, in the Pacific Mutual Life Insurance Company. Insured represented to that Company's doctor, who examined him, that he was then in good health. On the basis of this examination, the doctor recommended that the policy applied for be issued to the insured. The Company issued a sub-standard policy to Halliday, though he never accepted and paid for this policy. This doctor stated that he did not "discover upon examination or inquiry any evidence of disease or functional derangement, past or present, of the brain or nervous system". He also testified that if there had been

anything noticeable in the conduct of insured, he would have noted it in his report.

Insured's wife testified further that insured's condition did not improve after he was married and that he had threatened to commit suicide and kill her and the children; and that she had left him several times and stayed with her mother until he "would get a little better". But, as she testified, she had "never requested that he be sent to any mental hospital because he did not want to be", although she "thought it would be a good thing". She stated that she had been appointed Committee for the insured on December 19, 1935, when he was formally adjudged non compos mentis, and that he had been sent to a mental hospital in 1936 and had stayed in this hospital only about thirty days. There was testimony by several witnesses that the plaintiff had pursued a course of vocational training in agriculture after his discharge from the army and that he had to some extent engaged in farming. After insured had ended his vocational training, he rented a fifty acre farm upon which he did some work and later he bought a farm of seventy-three acres, on which he was living with his family at the time this case was tried.

Even if insured had been disabled at any time before [fol. 92] the expiration of his war risk policy on October 31, 1920, due to mental or nervous disease, there is no substantial evidence to show that his nervous or mental disorder brought about disability that was either total or permanent. It was aptly stated by Circuit Judge Gardner in *U. S.* v. *Kiles*, 70 F. (2d) 880, 883 (C. C. A. 8th.):

"Passing for the moment the question of the probative force of the testimony of the lay witnesses, and assuming that it was sufficient to show that the insured was suffering from mental derangement or insanity, still it does not appear what kind or degree of insanity afflicted the insured. That term is a very uncertain, ambiguous, and flexible one, and both legal and medical authorities recognize that there are different kinds and degrees of insanity. (Rodney v. Burton, 4 Boyce (27 Del.) 171, 86 A. 826; Clarke v. Irwin, 63 Neb. 539, 83 N. W. 783; Hopps v. People, 31 Ill. 385, 83 Am. Dec. 231); that the disease is as varied in intensity and shades of difference as is human character (Connecticut Mut. Life Ins. Co. v. Lathrop, 111 U. S. 612; 4 S. Ct. 533, 28 L. Ed. 536; Denson v. Beazley, 34 Tex. 191). It may be total,

complete, general, or partial in character, and it may be either permanent or temporary in duration. State v. Jack, 4 Pennewill (Del.) 470, 58 A. 833. So, while insured's mental affliction totally disabled him, it may nevertheless have been curable and temporary in duration, and it must be remembered that the insured did not die from this affliction. In the absence of proof as to its character, we cannot presume that the affliction was permanent."

In this connection, we might also note insured's failure to secure adequate hospitalization when this would have been available to him in a government hospital. It thus becomes highly speculative whether insured's ailments, whatever these may have been, would not have been cured by the medical treatment which was in his potential grasp. See the cases (all decided by this Court) of *Mikell* v. *U. S.*, 64 F. (2d) 301; *U. S.* v. *Ennis*, 73 F. (2d) 310; *U. S.* v. *Marsh*, 107 F. (2d) 173; *Neely* v. *U. S.* (decided November 12, 1940).

[fol. 93] Although it no longer becomes necessary for the purposes of this opinion to consider the correctness of the District Judge's rulings on the evidence, we do feel that one of these rulings was of such importance as to merit our present consideration. The District Judge announced early in the trial that no evidence would be admissible as to the insured's condition subsequent to December 9, 1935, the date on which the county Probate Court had adjudged the insured as of unsound mind and had appointed his wife as committee for him; that the admission of such evidence would constitute a collateral attack on a judgment which, the District Judge ruled, could not properly be subjected to such an attack. We believe that in this ruling the trial judge fell into error.

The adjudication of a probate court that the insured was insane was, as against persons not parties or privies to the lunacy proceedings, only prima facie evidence of the insured's actual insanity on the date of adjudication. See *Viccioni* v. *United States*, 15 F. Supp. 547, 549-550 (D. R. I. 1936); cf. *Cathcart* v. *Matthews*, 105 S. C. 329, 343, 89 S. E., 1021, 1026 (1916). See, also, *Hall* v. *Aetna Life Ins. Co.*, 85 F. (2d) 447, 451 (C. C. A. 8th, 1936); *Chaloner* v. *New York Evening Post Co.*, 260 Fed. 335, 337 (C. D. N. Y. 1919); *Johnson* v. *Pilot Life Ins. Co.*, 217 N. C. 139, 143, 7 S. E. (2d) 475, 477 (1940). Furthermore, this finding of the probate court, even if it be treated as conclusive evi-

dence as against the Government, should not be absolutely controlling in the instant case. The problem here is different from the one involved in the probate court; for the state of mind sufficient to secure an adjudication of "insanity" in an informal and ex parte proceeding in a probate court, is not necessarily, and often is not actually, sufficient to constitute disability that is both total and permanent. The instant case hinges upon the proof of a disability of mind far more serious than that required to be proved in a proceeding before the probate court. The probate court's [fol. 94] prior adjudication is only of evidential value in determining the total and permanent disability of a claimant under a war-risk policy; the adjudication is not conclusive, but it must be considered along with all the other relevant evidence for a determination in the District Court of whether or not the claimant is actually suffering from a total and permanent disability. See *Viccioni* v. *United States*, *supra*, 15 F. Supp. at pp. 549-550.

As we have indicated, the Government's motion for a directed verdict at the close of the evidence was denied in the District Court without any express reservation of decision. The Government did not later move to have the ultimate verdict and judgment set aside and for the entry by the District Court of judgment in favor of the Government notwithstanding the verdict. The Government did file a motion for a new trial, which was overruled. Yet we still believe we have power to direct that such judgment in favor of the Government be entered in the District Court. Under the *Federal Rules of Procedure* 50 (b), "Whenever a motion for a directed verdict made at the close of all the evidence is denied * * *, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion." The denial of the original motion for a directed verdict, it seems, is now treated as the equivalent of a reservation by the District Court. Accordingly, we believe that the Government's failure to move in the court below for judgment in its favor notwithstanding the verdict does not restrict our power in the premises. See *Conway* v. *O'Brien*, 111 F. (2d) 611, 613 (C. C. A. 2d, 1940). Also, cf. *Eastern Livestock Co-Operative Marketing Ass'n, Inc.* v. *Dickenson*, 107 F. (2d) 116, 120 (C. C. A. 4th, 1939); *Lowden* v. *Denton*, 110 F. (2d) 274, 278 (C. C. A. 8th, 1940). And see the remarks of Hon. William D. Mitchell, Chairman of the United

[fol. 95] States Supreme Court's Advisory Committee on the Federal Rules of Civil Procedure, *Federal Rules of Civil Procedure* and Proceedings of the American Bar Association Institute, Cleveland, 1938, at page 315:

"We do not by this rule make it necessary for the trial court even to say, 'I am reserving the question of law.' That is a form anyway, and we make it safe in all cases by the device of prescribing that wherever he refuses to grant a motion for directed verdict he is deemed to reserve the question of law, taking the verdict subject to his later determination, and consequently may on motion afterwards set aside the verdict, grant judgment notwithstanding, and the circuit court of appeals may take the same action."

Compare, too, *Brunet* v. *S. S. Kresge Co.*, (C. C. A. 7, decided November 20, 1940); *Willis* v. *Pennsylvania Ry. Co.*, (E. D. N. Y., decided December 5, 1940); *Montgomery Ward & Co.* v. *Duncan*, (U. S. Sup. Ct., decided Dec. 9, 1940).

Rule 50 (b) of the *Federal Rules of Civil Procedure* does specifically provide: "Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict". The rule also declares: "A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative". Then follow, in the rule, provisions as to the powers of the trial judge under these motions. We think it would have been the course of wisdom in the instant case for the Government to make in the lower court the motion for judgment notwithstanding the verdict. Yet we find nothing in the rule that restricts our power, as indicated in the case of *Baltimore & Carolina Line* v. *Redmon*, 295 U. S. 654, to direct the entry of judgment by the lower court in favor of the defendant, rather than to order the granting of a new trial, when the orderly administration of justice seems to require it. And this seems none the less true even though [fol. 96] the verdict of the judge was here in favor of the plaintiff, and even though here the defendant failed to file (as he is permitted under Rule 50(b)) in the lower court a motion, after the verdict, "to have judgment entered in accordance with his motion for a directed verdict."

The judgment of the District Court is reversed and the case is remanded to that court with directions to enter judgment in favor of the United States, appellant-defendant.

Reversed.

[fol. 97] In United States Circuit Court of Appeals, Fourth Circuit

No. 4714

United States of America, Appellant,

vs.

James H. Halliday, a person non compos mentis, by his Committee, Annie Halliday, Appellee

Appeal from the District Court of the United States for the Western District of South Carolina

Judgment—Filed and Entered January 9, 1941

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of South Carolina, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Western District of South Carolina, at Anderson, with directions to set aside the verdict and to enter judgment in favor of the United States of America, appellant, in accordance with the opinion of the Court filed herein.

Armistead M. Dobie, U. S. Circuit Judge.

January 9, 1941.

[fol. 98] IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Presented February 7, 1941

Comes now appellee in the above entitled cause, by counsel, and respectfully petitions this Honorable Court for a rehearing in this cause, and as grounds therefor states:

1. That portion of the opinion of this Court which remanded this case to the Court below with directions to enter judgment in favor of the United States involves a question [fol. 99] now pending before the United States Supreme Court in two cases, No. 336, in that Court, entitled *Leroy A. Berry, petitioner*, v. *United States of America, respondent*, and *Conway* v. *O'Brien*, No. 344, which were argued in that court on February 4, 1941, and February 5, 1941, respectively.

In those cases, as in the instant case, the Circuit Court of Appeals for the Second Circuit directed the District Court to take action which precludes a new trial. After the decisions by the United States Supreme Court in these two cases, this Court may wish to modify or change that portion of its opinion directing the lower court to enter judgment in favor of the United States.

By granting this petition for a rehearing this Court will probably decrease the burden of work in the United States Supreme Court, because the decisions of the United States Supreme Court in the *Berry* and *Conway* cases will certainly be controlling here. If contrary to the decision of this court they will be controlling here and this court will want to change its opinion to conform therewith; and if they sustain the action of the Second Circuit Court of Appeals, they will in effect preclude this appellee from asking the United States Supreme Court for a writ of *certiorari*. However, if this court does not grant a rehearing, it may be incumbent upon this appellee in order to preserve her rights pending the decisions of the United States Supreme Court in the *Berry* and *Conway* cases to apply for a writ of *certiorari* to the United States Supreme Court. All of this may be averted and this court will be privileged to correct its own opinion should the United States Supreme

Court reverse the *Berry* and *Conway* cases, without the necessity of asking that court to hear and decide the instant case.

2. There is pending in the United States Supreme Court a war risk insurance case which was argued on February 4th, 1941, wherein one of the questions presented is whether [fol. 100] the petitioner adduced sufficient evidence at the trial of his cause to sustain the verdict of the jury. That court will undoubtedly establish some definite rule of law which may be quite pertinent when applied to the facts in the instant case, and the decision of that court pertaining to the question of permanent and total disability may be such that this court would welcome an opportunity to change its opinion as to that phase of the instant case. That is one of the same cases mentioned above, the case of *Berry* v. *United States*, No. 336, in the Supreme Court of the United States.

3. At the time of the argument of this case before this court the question of the power of this court to direct, under the state of the record now before this court (absent a motion for judgment *non obstante veredicto*), that judgment be entered in favor of the Government in the District Court, was not argued by counsel or developed by the court. This question, which goes to the very vitals of the foundation of the fundamental principles of the law of the land, is too important to be passed upon thus lightly and without this court having the benefit of full argument by counsel for the respective parties.

By granting this motion this court can carefully reflect upon the far reaching effect of its decision and avail itself of the decision of the United States Supreme Court before finally passing upon this all important point of law. This, it is respectfully submitted, is the logical and correct procedure for this court to follow, and we respectfully urge it.

4. In the instant case appellant did not move to set aside the verdict as required by rule 50 (b). Therefore, this court was without authority to order that judgment be entered in favor of the United States as the case falls squarely [fol. 101] within and is contrary to the rule laid down by the United States Supreme Court in the case of *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, 57 L. Ed. 879, holding that a new trial must be granted under

similar circumstances. There is quoted below the headnot of the *Slocum* case which gives a succinct statement of the decision of the United States Supreme Court in that case:

"A circuit court of appeals, when reversing a judgment of the circuit court, entered on a general verdict in favor of plaintiff, because of error in refusing to instruct the jury that the evidence was insufficient to sustain a verdict for plaintiff, cannot direct, although in accordance with the state practice, as defined in Pa. Laws 1905, chap. 198, that judgment on the evidence be entered contrary to the verdict, but must award a new trial, in order to conform to the provisions of U. S. Const., 7th Amend., that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Appellant here did no more than was done by the respondent in the *Slocum* case and should have ordered a new trial. In this manner substantial justice will be done.

We respectfully submit that in effect this court has weighed the evidence to determine whether the evidence preponderates for or against this plaintiff. That responsibility under the Seventh Amendment lies solely with the jury. *United States* v. *Dudley*, 64 Fed. (2d) 743.

5. The decision of this court is also contrary to the decision of the United States Supreme Court in the case of *Aetna Insurance Company* v. *Kennedy*, 301 U. S. 389, which [fol. 102] dealt with the state practice after which rule 50 (b) was modelled. In that case that court held:

"The verdicts were taken unconditionally. Plaintiff moved for new trials but not for judgments. The court denied her motions and entered judgments for defendants. The Circuit Court of Appeals had jurisdiction to reverse and remand for new trials but was without power, consistently with the Seventh Amendment, to direct the trial court to give judgments for plaintiff. And, as before submission of the case to the jury the trial court denied plaintiff's motion for directed verdicts without reserving any question of law, neither that court nor the Circuit Court of Appeals had jurisdiction to find or adjudge that notwith-

standing the verdicts plaintiff was entitled to recover. *Slocum* v. *New York L. Ins. Co.*, 228 U. S. 364, 387, 57 L. Ed. 879, 889, 33 S. Ct. 523, Ann. Cas. 1914 D 1029. Our decision in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 79 L. Ed. 1636, 55 S. Ct. 890, is not applicable."

6. The interpretation placed by this court upon Rule 50 (b) defeats the purpose of the Rule. Rule 50 (b) provides an instrumentality by which, without loss of opportunity to take the verdict of the jury, the sufficiency of the evidence may be re-examined after the trial by the trial judge and his conclusion may be reviewed on appeal, with like effect as though the jury had been detained to await a directed verdict. This procedure, sanctioned when authorized by State practice, in *Baltimore and C. Line* v. *Redman*, 295 U. S. 654 (as was said in that case, p. 660), "came to be supported on the theory that it gave better opportunity for considered rulings". It should not be so loosely administered that the parties availing themselves of the rule shall not be required to take the step plainly indicated by the rule, viz., a motion for judgment subsequent to the verdict, by which alone the trial court is given the "better opportunity" to make the ruling in advance of the appeal. As [fol. 103] Rule 50 (b) is interpreted by the decision of this court, the purpose of this rule is for the benefit of the Circuit Court of Appeals and not the District Court. This was never the intention of this rule. A plaintiff for whom a verdict has been rendered and judgment entered, and the trial judge, should both be given opportunity in the trial court to deal with a claim for a judgment *non obstante veredicto* which oftentimes presents a situation where a trial judge in his discretion may order a new trial, before the case is taken into an Appellate Court, the discretion of which as to new trials is less broad.

The appellant did not seek a judgment *non obstante veredicto* in the District Court, nor did the District Court consider the entry of one. By its decision in this case this court attributes error to the District Court in failing to do that which the District Court was not asked to do.

7. This court violated the general common law relating to trials by jury and denied trial by jury to appellee in violation of the Seventh Amendment of the Federal Constitution in determining that there was no evidence upon

which the jury might find, (as it did) that the insured was permanently and totally disabled.

8. This court in its opinion in the instant case apparently cites as its authority the case of *Conway* v. *O'Brien*, 111 Fed. (2d) 611, 613 (C. C. A. 2nd 1940). In that case the Supreme Court of the United States granted a writ of *certiorari* upon the identical question passed upon here.

It was the privilege of one of counsel for appellee here, who had the next case following the case of *Conway* v. *O'Brien* in the United States Supreme Court when that case was argued on February 5, 1941, to hear the argument of counsel and remarks of the Justices of the United States [fol. 104] Supreme Court in both the *Conway* and *Barry* cases. The *Barry* case was set for argument just preceding the *Conway* case. It was assumed by the Justices of the United States Supreme Court during these arguments that if there had been no Rule 50 (b) under the *Redman* and *Slocum* cases the Second Circuit Court of Appeals would have had no authority to do other than reverse and remand for a new trial because there was no reservation by the District Court in both the *Barry* and the *Conway* cases. The same situation prevails in the instant case.

Counsel for the appellee here predict that the United States Supreme Court will reverse the Second Circuit in both the *Barry* and the *Conway* cases.

If the United States Supreme Court does this, by this court now granting appellee's motion for a rehearing in the instant case this court may thus obviate the necessity of appellee asking for a writ of *certiorari* in the instant case and thus avoid the necessity of having the United States Supreme Court reverse the action of this court in the instant case. By deferring action on this motion for a rehearing until the Supreme Court acts in the *Barry and Conway* cases this court may properly avail itself of the opportunity to avoid a reversal by the United States Supreme Court.

During the argument of the *Conway* case reference was made by the United States Supreme Court to the decision of this court in the instant case and counsel representing petitioner in the *Conway* case pointed out to the United States Supreme Court that in the cases cited by this court in support of its decision, investigation disclosed that there was no motion ever made for judgment after verdict as

provided in Rule 50 (b) and hence these decisions were not authority for the ruling of this court in the instant case.

Counsel for this appellee believe that when the records in each of these cases are examined that this will be found [fol. 105] to be a fact. There is not time now to permit counsel to personally make this investigation, but we are certain that counsel in the *Conway* case would not have made this statement in arguing before the United States Supreme Court if they had not made the investigation.

Upon a new trial, appellee may well supply the defects, if any, in the testimony sufficiently to prove permanent and total disability in the instant case. It is respectfully submitted that she should be given that right and is entitled when, upon a hearing this court grants her a new trial for that purpose.

Wherefore, appellee prays that this motion for a rehearing be granted and upon such rehearing this court reconsider its action and either affirm the action of the District Court or grant appellee a new trial.

Respectfully submitted, R. K. Wise, Columbia, South Carolina, Warren E. Miller, Washington, D. C., Attorneys for Appellee.

[fol. 106] February 12, 1941, motion of appellee for a stay of mandate pending petition for rehearing is filed.

February 17, 1941, order staying mandate pending action of the Court on petition of appellee for rehearing is filed.

IN UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

[Title omitted]

ORDER DENYING REHEARING—Filed and Entered March 10, 1941

This Court having at its January Term, 1941, rendered its decision reversing the judgment of the said District Court appealed from, and the appellee having on February 7, 1941, presented to the Court a petition for a rehearing of the said cause, and the same having been carefully considered,

It Is Now Here Ordered By This Court that the rehearing asked for, be, and the same is hereby, denied. Let mandate issue after the expiration of 5 days from this date.

March 10, 1941.

Armistead M. Dobie, U. S. Circuit Judge.

[fol. 107] March 15, 1941, motion of appellee for stay of mandate pending application for writ of certiorari is filed.

In United States Circuit Court of Appeals

Order Staying Mandate Pending Application for Writ of Certiorari—Filed and Entered March 15, 1941

Upon the Application of the Appellee, by his attorneys, R. K. Wise and Warren E. Miller, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled cause be, and the same is hereby, stayed pending the application of the said appellee in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, and provided said application is filed in the said Supreme Court within 30 days from this date.

March 15, 1941.

John J. Parker, Senior Circuit Judge.

In United States Circuit Court of Appeals

Order Authorizing Clerk to Use Original Transcript of Record in Making up Record for Use in the Supreme Court of the United States on Application for Writ of Certiorari

For Reasons Appearing to the Court,

It Is Ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in [fol. 108] this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further Ordered that a copy of this order be incorporated in said certified transcripts of records.

January 9th, 1941.

John J. Parker, Senior Circuit Judge.

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 109] Supreme Court of the United States, October Term, 1941

No. 101

Order Allowing Certiorari—Filed October 13, 1941

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.

[fol. 110] Supreme Court of the United States, October Term, 1941

No. 101

Order Granting Motion for Leave to Proceed in Forma Pauperis—October 13, 1941

On Consideration of the motion for leave to proceed further herein *in forma pauperis*,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration and decision of this motion.

Indorsed on cover: In forma pauperis. File No. 45,428. U. S. Circuit Court of Appeals, Fourth Circuit. Term No. 101. James H. Halliday, a Person Non Compos Mentis, by his Committee, Annie Halliday, Petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed May 22, 1941. Term No. 101, O. T., 1941.

(7102)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 101

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

R. K. WISE,
WARREN E. MILLER,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 101

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

May It Please the Court:

The petition of Annie Halliday respectfully shows to the Court:

A. Summary Statement of the Matter Involved.

The petitioner, plaintiff-appellee below, recovered judgment against the respondent in the District Court of the United States for the Western District of South Carolina, on the verdict of a jury (R. 45), for total permanent disability benefits under a contract of yearly renewable war risk term insurance, judgment being entered by the District

Court for the sum of $57.50 per month in petitioner's favor beginning April 2, 1919.

At the conclusion of the evidence, respondent-appellant moved for a directed verdict.

Respondent-appellant appealed, presenting the question of whether there was substantial evidence that the insured became totally and permanently disabled, and whether the trial court erred in excluding evidence and in charging the jury.

The United States Circuit Court of Appeals for the Fourth Circuit, in the decision now sought to be reviewed (R. —), which is reported in 116 F. (2d) at page 812, held that there was no substantial evidence to prove that the insured was totally and permanently disabled. Having so decided, the Court of Appeals reversed and remanded the cause, not for a new trial, but with direction to enter judgment in favor of the United States, respondent-appellant, though no motion for a judgment despite the verdict had been made nor did the record show any consideration by the District Court subsequent to the verdict of the question which had been raised by a motion for a directed verdict.

Petitioner recognizes that in some cases evidence to take the issue of total permanent disability to the jury may fall short of that which requires the jury to consider the issue, but the settled rule is that on such motion the evidence should be viewed in the light most favorable to plaintiff. The Circuit Court of Appeals did not mention this rule in its decision, but violated it and invaded the province of jury. Petitioner further concedes that an overruled point that a verdict should have been directed may be saved and renewed by a motion for judgment. But this was not done here. The result,—the order for the entry of judgment contrary to the verdict,—deprives petitioner of his right of trial by jury, contrary to the Seventh Amendment.

The opinion of the Circuit Court of Appeals gives the general outline of the facts, though it understates some upon which petitioner relied, and chooses between the conflicting testimony a version different from that which it may be fairly assumed the jury believed. The facts are hereafter set forth in the petitioner's brief in support of this petition.

Rule 50 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States states:

> "Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

No motion was made by the respondent as permitted by this rule to have the verdict and judgment set aside and to have judgment entered in accordance with his motion for a directed verdict, within ten days after the reception of the verdict or at any time, nor was any action of any

kind taken until the taking of an appeal to the Circuit Court of Appeals, nor was there then any action other than the taking of the appeal and the making up of the record on appeal. The facts which the court below found could have been found by the jury on the testimony. It certainly can not be said, however, that the facts which the court found were those most favorable to the plaintiff which could be founded upon the testimony. It certainly has been the long settled law that the verdict of a jury is not to be directed or upset, unless the latter is true.

In justification for the decision to direct the dismissal of the complaint instead of a new trial, the Circuit Court of Appeals states, in effect, that the procedure outlined in Rule 50 (b) need not be followed in order that the Circuit Court of Appeals may adjudge that a motion for judgment despite the verdict (never made here) should have been granted (R. 57).

The court below recognizes in its opinion that it was entering judgment notwithstanding the fact that its action was contrary to the expressed provision of Rule 50 (b). It stated (R. 57):

> "• • • We think it would have been the course of wisdom in the instant case for the Government to make in the lower court the motion for judgment notwithstanding the verdict. Yet we find nothing in the rule that restricts our power, as indicated in the case of Baltimore & Carolina Line *v.* Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, to direct the entry of judgment by the lower court in favor of the defendant, rather than to order the granting of a new trial, when the orderly administration of justice seems to require it. And this seems none the less true even though the verdict of the judge was here in favor of the plaintiff, and even though here the defendant failed to file (as he is permitted under Rule 50 (b)) in the lower court a motion, after the verdict, 'to have judgment entered in accordance with his motion for a directed verdict.'"

The learned court cites in support of its position certain decisions which however are not controlling as will be more fully discussed in the brief filed in support hereof. In one of the decisions cited by the court below, the case of *Conway* v. *O'Brien*, Second Circuit, 111 F. (2d) 611, this Court granted certiorari to examine whether there had been sufficient compliance with Rule 50 (b) to authorize dismissal of the complaint, but this Court's view of the merits of that case made it unnecessary to discuss this question. That case involved the same question here presented and for the reasons which prompted this Court to grant certiorari in that case it is urged that this Court grant this petition.

In the case of *Berry* v. *United States*, No. 366, October Term, 1940, 85 L. Ed. (Advance Sheets, page 576) this Court in its opinion of March 3, 1941, stated that the Circuit Courts of Appeal were not in complete agreement upon the question here presented, yet this Court in the *Berry* case held that there was no occasion to decide the question here presented because this Court held that in that case the Circuit Court of Appeals erred as there was evidence from which a jury could reach the conclusion that the insured was totally and permanently disabled.

The action taken by the United States Circuit Court of Appeals in the instant case is contrary to the action taken by the United States Circuit Court of Appeals in the Fifth Circuit Court in the case of *Pruitt et al.* v. *Hardware Dealers Mutual Fire Ins. Company*, 112 F. (2d) 140; and is probably in conflict with the decision of this Court in the case of *Berry* v. *United States* decided March 3, 1941, where this Court stated:

> "Rule 50 (b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the

> jury's without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."

In this Court's opinion in the *Berry* case it mentioned the decision of the court below in the instant case in its footnote No. 3 when it made the statement that the Circuit Courts of Appeal are not in agreement upon this important question of law.

It is believed that the Fifth Circuit Court of Appeals in the case of *Pruitt et al.* v. *Hardware Dealers Mutual Fire Ins. Company*, 112 F. (2d) 140, correctly states the applicable law and should be followed by this Court.

B. The Basis of the Court's Jurisdiction.

It is competent for this Court to require by certiorari that this cause be certified to it for determination pursuant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 U. S. C. A., Section 347.

C. The Questions Presented.

Two separate and wholly independent and important questions of Federal Law are presented here which involve the very foundation of our judicial system. If the decision of the Circuit Court of Appeals stands the safeguard of jury trial guaranteed by our constitution is nullified. They are:

1. Whether the Circuit Court of Appeals violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh

Amendment of the Federal Constitution in determining that there was no evidence upon which the jury might find petitioner-appellee totally and permanently disabled, testimony which the jury may have believed, thus usurping the functions of the jury by invading their province with respect to the testimony.

2. Whether the new Federal Rule 50 (b) which expressly provides that whenever a motion for directed verdict at the close of the evidence is denied, the Court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion, and which further provides that within ten days after the reception of the verdict, the party who has moved for a directed verdict may move to have the verdict and judgment thereon set aside and to have judgment entered in accordance with his prior motion, is to be construed as though it provided that if the party does not within ten days or at any time after the return of the verdict move to set the verdict and judgment aside and to have contrary judgment entered, such a motion shall, nevertheless, be deemed to have been made and denied. Otherwise expressed, whether a party need not seek a judgment *non obstante veredicto* in the District Court, nor the District Court consider the entry of one, in order to find a direction by the Circuit Court of Appeals that such a judgment should have been entered in the District Court, thus attributing to the District Court error in failing to do what the District Court was not asked to do.

D. The Reasons Relied On for the Allowance of the Writ.

1. It is important, in order that trial by jury may be preserved as intended by the Seventh Amendment, that this Court shall determine whether a Circuit Court of Appeals

may determine that a verdict should have been directed, by finding facts which are less favorable to petitioner than those which might have been found by the jury on the evidence.

2. The decision sought to be reviewed determined a novel and important question arising under Rule 50 (b) of the new Federal rules in a way in conflict with the decision of the Fifth Circuit Court of Appeals in the case of *Pruitt et al.* v. *Hardware Dealers Mutual Fire Ins. Company*, 112 F. (2d) 140; and in a way probably in conflict with the decisions of this Court in the cases of *Slocum* v. *New York Life Insurance Co.*, 288 U. S. 364, and with the recent decision of this Court in the case of *Berry* v. *United States*, decided March 3, 1941, 85 L. Ed. (Advance Sheets, page 576) No. 366, October Term and with the decision of this Court in the case of *Aetna Insurance Company* v. *Kennedy*, 301 U. S. 389, 395, which dealt with the State practice after which this rule was modelled.

Other Circuit Courts of Appeal which have reviewed motions for judgment contrary to verdicts made in District Courts pursuant to Rule 50 (b) have implied that they considered the making of such motions in the District Courts after verdict as required by the rule as indispensable to affirmance or reversal of the action of the District Courts on such motions. *Leader et al.* v. *Apex Hosiery Co.*, 108 F. (2d) 71 (C. C. A. 3) and *Mass. Protective Association* v. *Mouber*, 110 F. (2d) 203 (C. C. A. 8); *Ferro Concrete Construction Company* v. *United States*, 112 F. (2d) 488 (C. C. A. 1); *Lowden et al.* v. *Denton*, 110 F. (2d) 274 (C. C. A. 8); *Reliance Life Ins. Co.* v. *Burgess et al.*, 112 F. (2d) 234 (C. C. A. 8).

Rule 50 (b) provides an instrumentality by which, without

loss of opportunity to take the verdict of the jury, the sufficiency of the evidence may be reexamined after the trial by the trial judge and his conclusion may be reviewed on appeal, with like effect as though the jury had been detained to await a directed verdict. This procedure, sanctioned when authorized by State practice, in *Baltimore and C. Line* v. *Redman*, 295 U. S. 654 (as was said in that case, p. 660) "came to be supported on the theory that it gave better opportunity for considered rulings." It should not be so loosely administered that the parties availing themselves of the rule shall not be required to take the step plainly indicated by the rule viz., a motion for judgment subsequent to the verdict, by which alone the trial court is given the "better opportunity" to make the ruling in advance of the appeal. A plaintiff for whom a verdict has been rendered and judgment entered, and the trial judge, should both be given opportunity in the trial court to deal with a claim for a judgment *non obstante veredicto* which oftentimes presents a situation where a trial judge in his discretion may order a new trial, before the case is taken into an Appellate Court, the discretion of which as to new trials is less broad. In any event, the decision of this Court in *Aetna Insurance Co.* v. *Kennedy, supra*, indicated that a failure to make an appropriate motion in the trial court would be an insuperable bar to the entry by the Appellate Court of judgment other than for new trial.

If it is not necessary to give one's opponent a day in court on motions *non obstante veredicto* in the District Court, before invoking final action by the Circuit Court of Appeals as though such motions had been made in the District Court, as was held by the court below, this constitutes such a departure from the principles heretofore settled by this Court

in respect of the prior similar practice, as would be sufficiently important for this Court to settle the matter.

WHEREFORE, petitioner prays for the allowance of a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit in this cause in order that it may be reviewed and determined by this Honorable Court.

JAMES H. HALLIDAY,
A Person Non Compos Mentis,
By His Committee, ANNIE HALLIDAY,
Petitioner,
By R. K. WISE,
Columbia, S. C.;
WARREN E. MILLER,
1343 H Street Northwest,
Washington, D. C.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 101

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

Reference to Report of Opinion Below.

This case in the District Court was not reported. In the Circuit Court of Appeals for the Fourth Circuit it is reported in 116 F. (2d) 812.

Grounds of Jurisdiction.

This Court has jurisdiction pursuant to the Act of February 13, 1935, c. 229, Section 1, 43 Stats. 938, amending and re-enacting Section 240 (a) of the Judicial Code, 28 U. S. C. A., Section 347.

Statement of the Case.

Plaintiff claims permanent and total disability under his contract of war risk term insurance from April 2, 1919

(R. 3) which was denied by defendant's answer (R. 4). The jury returned a verdict on November 30, 1939 for the plaintiff and fixed the date of his permanent and total disability as April 2, 1919 (R. 45).

Judgment was entered in favor of plaintiff on April 18, 1940 (R. 45) and on appeal the United States contended that there was no substantial evidence that plaintiff was totally and permanently disabled and that the trial court committed reversible error in excluding evidence and in charging the jury. The United States Circuit Court of Appeals for the Fourth Circuit reversed the judgment of the trial court and remanded the case with directions to enter judgment in favor of the United States (R. 57) notwithstanding the fact that no motion *non obstante veredicto* was made as required by Rule 50 (b) of the Federal Rules of Civil Procedure.

Errors to be Urged.

1. The court below erred in finding there was no substantial evidence to prove that the insured was totally and permanently disabled as found by the jury by assuming the facts less favorable to plaintiff-petitioner than the jury could find from the evidence.

2. The court below erred, having found error in submission of the case to the jury, in directing the entry of judgment for defendant-respondent instead of remanding the case to the District Court for new trial.

Summary of Argument.

I. The Circuit Court of Appeals Erred in Holding that the District Court Erred in not Directing a Verdict for Respondent.

II. Assuming the District Court Erred in Submitting the Case to the Jury, the Circuit Court of Appeals Erred

IN DIRECTING JUDGMENT NOTWITHSTANDING THE VERDICT INSTEAD OF DIRECTING A NEW TRIAL (NO MOTION OF THIS CHARACTER HAVING BEEN MADE).

III. THE OPINIONS OF THIS AND OTHER COURTS IMPLY THAT THE MOTION REQUIRED BY RULE 50 (B) FOR JUDGMENT NON OBSTANTE VEREDICTO IS ESSENTIAL TO CONFER AUTHORITY ON THE CIRCUIT COURT OF APPEALS TO AFFIRM OR REVERSE THE DISTRICT COURT WITHOUT REQUIRING A NEW TRIAL.

ARGUMENT.

I. The Circuit Court of Appeals erred in holding that the District Court erred in not directing a verdict for respondent.

Upon admitted facts, if reasonable men might differ as to whether the insured was totally and permanently disabled as found by the jury the question was for the jury. Here facts were in dispute which were assumed by the Circuit Court of Appeals less favorable to petitioner than the evidence warranted.

It is significant that the court below at no place in its opinion reciting the facts upon which it found the evidence to be insubstantial referred to the fundamental rule that in determining a motion for a directed verdict the court must assume that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and all the inferences fairly deducible from the facts should be drawn in favor of the opposing party. See *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Richmond & Danville R. R.* v. *Powers*, 149 U. S. 43, 45; *Texas & Pacific Ry.* v. *Cox*, 145 U. S. 593, 606; *Railroad Co.* v. *Stout*, 17 Wall. 657, 663.

Abundant substantial evidence, medical and lay testimony and record evidence appears in this record. Plaintiff introduced one physician and seven lay witnesses. Defendant introduced one physician and but one lay witness. Gov-

ernment records showing plaintiff's nervous condition prior to his discharge from the Army and reports of medical examiners and hospital records after his discharge from the Army were introduced.

Doctor J. N. Land, who knew the insured practically all his life (R. 22) described his mental condition as psychoneurosis and said he was a hypochondriac. This witness testified (R. 22-23):

> "He is the talking type insanity. He has talked to me every chance he has got since 1919. He wants to know if I can do anything for him; that nobody else can do anything for him. He has not been friendly to me at all times. I have never done him any harm. He does talk about me. I just go ahead and do the best I can for him. I would say his mental condition would keep him from working. He is not able to judge the necessity of the thing to be done about his business. *I would not have advised him to do any work since he has been out of the army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically.*" (Italics supplied.)

This evidence is substantial and shows that the insured was unable to work without it being harmful to him. This Court in the *Lumbra* case, 290 U. S. 551 (at page 560) stated:

> "The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. *He may have worked when really unable and at the risk of endangering his health or life.*" (Italics supplied.)

This Court in the *Lumbra* case cited favorably the following cases:

United States v. *Phillips* (C. C. A. 8) 44 F. (2d) 689, 691;

United States v. *Godfrey* (C. C. A. 1) 47 F. (2d) 126;

Carter v. *United States* (C. C. A. 4) 49 F. (2d) 221, 223;
United States v. *Lawson* (C. C. A. 9) 50 F. (2d) 646, 651;
Nicolay v. *United States* (C. C. A. 10) 51 F. (2d) 170, 173.

Here every element, which is usually pointed out in opinions as making against the claim of total and permanent disability is absent; those which make for it, present.

The court properly charged the jury (R. 39):

> "* * * Now, in considering what is permanent and total disability, the Government of the United States, operating this department of the Government providing for the World War veterans, has in its Regulation Number 11 defined what permanent and total disability means in the opinion of the Government, the defendant here. It defines total disability as any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially (R. 39) gainful occupation, without serious impairment to either body or mind. And it is to be deemed to be permanent when found on conditions rendering it reasonably certain that it will continue throughout the life of the person so suffering from it. That means, to go just a little further—because that is perfectly clear, any impairment of mind or body from April 2nd, 1919; *whether or not that person became so disabled by such impairment of mind or body that he was thereafter unable to follow continuously any substantially gainful occupation, without serious impairment to either mind or body. Suppose he tried to follow a substantially gainful occupation and the doctor told him. 'If you do that, it is going to seriously impair your body or mind.' I think it proper to call your attention to this, that the only testimony on that point was by Dr. Land. He said that in his opinion there would have been a complete collapse of mind and body if he had worked. You have to take that into consideration. That is the only*

medical evidence on that point in the case, and I think it proper and appropriate to call that to your attention." • • • (Italics supplied.)

The Circuit Court of Appeals, in commenting upon this testimony of Doctor Land stated that it had little probative force, basing its opinion, among things, that the doctor did not make a *physical* examination of the insured until about six years before trial. However, this suit is based upon a mental condition and even though the testimony might have but "little" probative force, yet whatever probative force it does have was for the jury to determine and not for the Circuit Court of Appeals.

Doctor Land also testified (R. 23):

"He is not physically in good shape, and is mentally in bad shape. *When he got out of the Army I didn't hold any hope for his recovery*, a man in his condition will go from bad to worse. I think he has gradually progressed since he came out of the Army. I was instrumental in having a committee appointed for him.

"The report of February, 1921 shows hypochondriasis, that is a morbid, imaginative condition. A hypochondriac imagines everything. He imagines his best friends are his enemies. As a matter of fact, in my conversations with this man he has dwelled (R. 23) on the fact that everyone of his neighbors and his old friends are doing everything that they can to double-cross him, as he expresses it. That follows that line of mental disability. You never find two mental cases exactly alike. • • •" (Italics supplied.)

(R. 25) "I thought he was a crazy man. • • • I know I tried to get him in (R. 26) the Columbia Hospital and they refused to take him. That was in 1937. • • •"

(R. 26) "My opinion about his mental condition since 1919 is based on my own knowledge, and not on what somebody else told me.

Q. I believe you have already said that your prognosis back in 1919 was that you never did think he would

recover. Has that been verified by the fact that he is in the same condition now or probably a little worse than he was back in 1919?

A. Yes, sir. * * *"

The insured's wife, who first met him in 1913, testified (R. 5):

* * * "We were married on April 16, 1921, at which time he was taking vocational training, training to rehabilitate himself so he could do something after the War, but he never could do anything. He was taking training in Waynesville, North Carolina, and I went there. From there we went to Athens, Georgia and stayed about a year and a half, while he continued taking vocational training. While in Waynesville, his condition did not improve, nor did he get any better in Georgia. After leaving Georgia, we came out to the little farm and he tried to work in 1924.

(R. 5) With reference to his condition at the time we were married, he was far from well. He complained all the time of his stomach, his heart, and his kidneys. As a result of trying to work on the farm, he became more nervous and couldn't sleep, and couldn't retain his food. It just upset him all the time. *That has continued to be true up to the present time.* He could not work all day. He worked maybe an hour or two. * * *" (Italics supplied.)

This testimony coming from a person who had an opportunity to continuously observe the insured shows that working actually was harmful to him. The court below did not draw proper inferences from this testimony. The weight to be accorded this testimony was for the jury to pass upon and undoubtedly it believed this witness and accorded her testimony and that of Dr. Land due weight.

The insured's wife further testified (R. 5):

"* * * With reference to his mental condition, he was suspicious * * * of everybody. That has been true since his discharge from service. He is suspicious of

his neighbors too. He thinks they are all against him. He thinks everybody is against him. He has threatened to commit suicide and to kill me and the children and all. I would leave several times and go to my mother's and stay until he would get a little better. I would always go back home. He doesn't like to go off and eat away from home at all because, for one thing, he is afraid somebody is going to poison him. I do all of the cooking myself at home and he stays right with me. He doesn't like to go to a hospital. Sometimes he pours his own medicine. He thinks he is going to be poisoned. When I mention Augusta, *he says he would rather die than go there.* He (R. 5) has been in the hospitals at Columbia, South Carolina, and Roanoke, Virginia. He has been to Greenville before we were married, and Oteen. * * *"

* * * * * * *

"Q. Has this condition improved any since you were married?

A. None whatever.

Q. Is it any worse?

A. Well, he is harder to control now than he was at first. * * *"

The jury was justified in believing from the foregoing testimony that the insured's condition had not improved from April 16, 1921 when he was married until the date of the trial; and if his condition did not change in this period of time it was justified in concluding that it was reasonably certain that it would continue throughout the remainder of his life.

It was aptly stated by a Federal district judge, in a war risk insurance case (*McGovern* v. *United States*, 294 Fed. 108, affirmed 299 Fed. 302, Cert. dis. 267 U. S. 608):

"As permanency of any condition (here, total disability) involves the element of time, the event of its continuance during the passage of time is competent and cogent evidence."

This was a proper inference to be deduced from the foregoing testimony but the Court of Appeals did not take this view of the evidence, favorable to the insured.

The Court of Appeals apparently penalizes the insured because his wife did not send him to a mental hospital. This is not only failing to give the evidence here all the proper inferences as required by decision of this court in *Gunning* v. *Cooley*, 281 U. S. 90 but penalizes this mentally incompetent insured because of something his wife did not do which apparently the Circuit Court of Appeals felt she should have done.

It is common knowledge that many persons abhor being patients in hospitals. Particularly is this true of a person suffering from mental ailments as was this insured; and particularly did he loathe the hospital at Augusta, Georgia. Persons with mental impairments are not held to the strictest rule of human conduct under the law but notwithstanding this, the court below held this crazy man to the same degree of care that it would impute to a sane man.

The court below apparently takes the position that it was incumbent upon the insured to secure adequate hospitalization, notwithstanding evidence of record here from Doctor Land that he tried to get him in the government hospital in Columbia but the government would not take him (R. 26). In this connection Doctor Land testified (R. 25):

> * * * "I thought he was a crazy man (R. 25). * * * I know I tried to get him in the Columbia Hospital and they refused to take him. That was in 1937. They refused to take him and suggested that he be taken to Augusta, Georgia and they discharged him from the hospital in Roanoke as mentally competent, yet they wouldn't take him for intestinal trouble in Columbia. I wrote them a letter asking why, if he was mentally competent when he was discharged from Roanoke, they wouldn't take in Columbia for intestinal

> trouble and wanted to send him to Augusta. I asked that question and they never answered it. * * *" (R. 25) Hospitals have not always been available.

The Circuit Court of Appeals gave to the facts in this case a much less favorable view than the evidence warranted on the question of hospitalization. It apparently overlooked entirely the above quoted testimony of Doctor Land in this regard, the apathy of the insured to hospitals, the fact that one suffering from a mental condition would rather be around their loved ones than behind the bars of a government insane asylum, and the fact that his own physician could not get the government to hospitalize him; and in addition th Circuit Court of Appeals placed upon this mentally incompetent disabled World War Veteran the burden of knowing what was best for him and erroneously penalized him for the failure of his wife to send him to an insane asylum against his wishes although she thought it would be a good thing. The Circuit Court of Appeals, in placing this construction upon this testimony overlooked the human element which doubtless appealed to this jury, who doubtless gave weight to this testimony, based upon their experience in life. This petitioner was denied by the Circuit Court of Appeals the most favorable inferences which should be drawn from this testimony. Clearly, the court below placed upon this testimony inferences most favorable to the defendant below and substituted its opinion in weighing the facts for that of the jury, thus violating the 7th Amendment, and the rule enunciated by this court in *Gunning* v. *Cooley, supra.*

Particularly is it significant in the instant case that the United States produced no witness to contradict the testimony of Doctor Land or any one of petitioner's seven lay witnesses. Defendant's only medical witness, Doctor Young, testified that no (R. 33) mental examination was

made by him of the insured and admitted that it was not unusual to examine a person physically and overlook the (R. 33) "mental side" and that very often the patient can conceal the fact of mental abnormality from the physician who makes a physical examination.

The court below cites the case of *Mikell* v. *United States*, 64 F. (2d) 301, a case of chronic appendicitis, *United States* v. *Ennis*, 73 F. (2d) 310, a case of tuberculosis, *United States* v. *Marsh*, 107 F. (2d) 173, a case involving appendicitis and adhesions, *Neeley* v. *United States*, 115 F. (2d) 448, a case involving arrested tuberculosis as authority for the proposition that the conduct of this insured, who is insane, is governed by the same rules as the conduct of a sane person. None of the cases cited by the court below involve an insane man as authority for the proposition that this insane veteran should be charged with the failure of the government to adequately hospitalize him. This portion of the decision of the court below is contrary to the reasoning in the decision of the Fifth Circuit in the case of *Gilmore* v. *United States*, 93 F. (2d) 774 where that court at page 777 stated:

> * * * "but an inference drawn by a process of probable reasoning from the conduct of an ordinarily prudent person does not rationally follow from the same conduct of one who is insane * * *."

The court below although stating that it was unnecessary in view of the position they took that there was insufficient evidence to submit the case to the jury, proceeded to consider a ruling by the District Judge that no evidence would be admissible as to the insured's condition subsequent to December 9, 1935 the date on which the State Probate Court adjudged the insured to be of unsound mind and appointed his wife as committee for him.

In the case of *Cox* v. *United States*, 24 F. (2d) 944, which was a case involving the war risk insurance contract of a

mentally incompetent person, the Fifth Circuit Court of Appeals stated:

> "As an interdict he was incapable of entering into a legal contract of employment, and it is reasonably certain that he could not have secured employment from any but a friend who would put up with his idiosyncrasies. Ability to continuously follow a substantial, gainful occupation implies *ability to compete with men of sound mind and average attainments under the usual conditions of life.* Argument is not needed to demonstrate that one who has been officially declared insane and has exhibited the vagaries that Cox did could not successfully so compete, although he might have lucid intervals in which he could render satisfactory service. This conclusion finds support in the reasoning of the court in the following cases: Starnes *v.* U. S. (D. C.), 13 F. (2d) 212; Jagodnigg *v.* U. S. (D. C.), 295 Fed. 916; Forbes, Dir., *v.* Welch (App. D. C.), 286 Fed. 866." (Italics supplied.)

It was stated by the Court of Appeals for the District of Columbia in the case of *Forbes* v. *Welch* (No. 3883 in that court) 286 Fed. 765:

> "The decree of lunacy, however, is prima facie evidence of the actual insanity of the person thereby placed under guardianship, and establishes a status of that individual which is notice of the incapacity of the ward to all the world. Leggate *v.* Clark, 111 Mass. 308. It does not establish as against strangers or as between a party or as between a party, or privy, and a stranger the form of the insanity of the ward, its transmissible character, or any evidentiary fact upon which the ultimate adjudicated fact is grounded." Boston Safe Deposit and Trust Co. *v.* Bacon, 229 Mass. 585, 589.
>
> "The decree, however, has evidential bearing upon the question of total disability. It is a dominant fact too important to be totally ignored. *By virtue of the decree the ward is restrained from pursuing any gain-*

ful occupation. His disability, regardless of the degree of insanity or mental or physical disqualification, is complete."

Incidentally, counsel for appellee stated to the court (R. 10) that he had no objection to appellant asking questions as to the record of the insured's activities since the appointment of a committee by the Probate Court, and stated that the government records would show that the insured was insane after December 9, 1935. As a matter of fact, on December 18, 1935 the records show (but are not in evidence here because the court on objection (R. 22) by government counsel excluded them) that the insured was given a diagnosis of manic depressive psychosis, depressed type.

When considered in the light of all other evidence in this case, including the action of government counsel, appellant's lack of contention in its appeal in the court below that it had any proof to offer to rebut the continued insanity of the insured, and appellant's contention that the action of the trial court merely relieved plaintiff from establishing total permanent disability to the date of trial, it follows that it was not error for the court to exclude this evidence.

If there was error, it was not prejudicial, but harmless. Appellant has not shown here that it was at all prejudiced in the ruling of the trial court in the instant case. In order for reversible error to exist, this must be shown.

From the record now before the court there is a legal presumption of the continued insanity of the insured after his adjudication until the contrary is shown. The general rule seems to be that a person adjudged to be insane is presumed to so continue until it is shown that sanity has returned. But here we do not need to rely on this presumption because the facts conclusively establish insanity at time of trial. The complaint filed November 20, 1936 by the insured's committee (R. 2-3) and the testimony of the committee

shows conclusively that both at the time this suit was filed and at the time of the trial on November 30, 1939 (R. 4) the insured's wife was still his committee. So, it could not have been shown by the appellant that the insured had been restored by the county court to sanity.

Being insane and so adjudicated the insured was incapable of entering into a legal contract of employment with any one and is incapable of handling his own affairs. This fact could not have been disputed.

As was said by the court in *United States* v. *Newcomer*, 78 F. (2d) 50, where there was a substantial work record:

> • • • "His mental condition prevents him from working as other human beings work. He is not monarch of his mind. There is lack of co-ordination between his mind and his body, and as said by us in Asher *v.* United States (C.C.A. 8) 63 F. (2d) 20, 23:
>
> "True, the record shows that insured has been able to do some work. He could do some work like the ox of the field, when guided and directed, but not as an intelligent human being. • • •"

In the case of *Jagodnigg* v. *United States*, 295 Fed. 916, a war risk insurance case in which the court held the insured to be permanently and totally disabled, after reciting the definition of total and permanent disability said:

> "This certainly does not mean that the requirements 'to follow continuously any substantially gainful occupation' shall be satisfied by the performance of some negligible duties under supervision and direction of a guardian or caretaker. What is meant is clearly the ability of the soldier to earn substantially through *independent effort*. This young man has physical strength, but he is less than a child in mind. He has been judicially held to be capable of handling his affairs. He is under guardianship, • • •"

This appellee has not been harmed by the ruling of the trial court as to evidence after 1935 because obviously it

could not prove that an insane man was able to follow continuously a substantially gainful occupation.

It was said by the trial court (R. 45) here:

> • • • "the jury returned a proper verdict in this case and I am convinced that if new trial were granted, another jury would come to the same conclusion. • • •"

II. Assuming the District Court erred in submitting the case to the jury, the Circuit Court of Appeals erred in directing judgment notwithstanding the verdict instead of directing a new trial (no motion of this character having been made).

In order that the sufficiency of evidence may be reexamined after verdict looking to a judgment notwithstanding a verdict, without new trial, not only must some appropriate means be taken to reserve the point before submission to the jury but the point must by some appropriate means be submitted to the trial judge after verdict and be by the trial judge considered or refused consideration. A benefit of this procedure stressed by the authorities, is that it gives the trial judge an additional and unhurried opportunity to pass on the point.

Under Federal District Court Rule of Practice 50 (b), a motion for directed verdict automatically reserves the point, but does not automatically invoke the action of the trial judge upon the reserved point. This is done by the party against whom the jury has found if he still conceives himself entitled to a judgment notwithstanding the verdict. Since this was not done here, the error before the Circuit Court of Appeals was only error in the course of the trial, upon which retrial only may be ordered.

Assuming, contrary to our contentions, that there was not sufficient evidence to take the case to the jury on the

issue of total and permanent disability, we respectfully submit that the judgment of the Circuit Court of Appeals should have been reversal and order for new trial. This, because the only error in the record was one occurring in the course of the trial, viz., the denial of the motion for directed verdict. There was no error by way of refusal to vacate the verdict (and judgment) and enter judgment for respondent, because the District Court does not appear to have refused so to do. By no procedure, formal or informal, was the District Court's consideration directed to the making of such an order as the mandate of the Circuit Court of Appeals now directs that the District Court made.

New Federal Rule 50 (b) makes universally possible in federal practice the substance of the procedure approved in *Baltimore & C. Line* v. *Redman*, 295 U.S. 654, and in the dissenting opinion of Chief Justice Hughes in *Slocum* v. *New York L. Ins. Co.*, 228 U.S. 364, 400. The discussion in the Chief Justice's opinion is more full, and is prophetic of the adoption of a federal rule. He discusses the manner by which sufficiencies of evidence have been challenged in common law courts, and the points so raised preserved and disposed of post-verdict with like effect as though determined before submission of cases to juries. He makes plain that whether the means be a "demurrer to the evidence," a motion for a directed verdict, a conditional taking of a verdict with reserved questions of law, a motion for a judgment *non obstante veredicto*, a motion in arrest of judgment, or statutory equivalents or enlargements of these common law conceptions, the substance remains the same. That substance is that the error in the grant or denial of a directed verdict is an error in the course of the trial, redressable only by the vacation of the trial and

a new trial, unless means are taken to bring the matter into the record for disposition by the judge after the trial.

This is accomplished in all of the illustrations given in this learned opinion by steps in substance as follows: (1) reservation of the point when the case is submitted to the jury, and (2) submission of the point to the judge for decision after the verdict. The means by which these two steps have been accomplished have varied, some of them have been statutory, but without the substance of these two steps an erroneous submission to the jury has not been held, in the precedents collated in this opinion, more than an error in the course of trial calling for a new trial.

What is lacking in the present record is the second of the two steps, which the review of the authorities made in the opinion shows to have been invariably taken to get into the record a ruling (for or against a judgment) on the affirmance or reversal of which, judgment could properly be directed in the Appellate Court. There was no submission to or consideration by the District Court after the verdict of the question whether judgment should despite the verdict be entered for the defendant.

The Federal Rule 50 (b) is merely an instrumentality to accomplish the reform which had been local to the states, notably Pennsylvania and New York, from which these leading cases came.

It provides a means by which the two steps are taken to get into the record on appeal the question whether a final judgment contrary to the verdict and judgment below should be entered. The first step, the reservation of the point or the conditional submission to the jury, is made automatic and implied in the denial of a motion for a directed verdict. The second step is to be taken by the party against whom the ruling was made on the motion for directed verdict. He may move within ten days for a judgment in accordance with his prior motion for a directed

verdict. The rule, which so expressly supplies the reservation, does not supply the motion for judgment.

If no motion for judgment is made, then the purposes of this procedure, as explained in *Baltimore & C. Line* v. *Redman*, *supra*, 295 U. S. 654, 660, viz., that it "gave better opportunity for considered rulings," is defeated. There is no unhurried second opportunity for the trial court to rule on the sufficiency of the evidence. It must be the trial court that is referred to, as the appellate court's opportunity for consideration of the sufficiency of the evidence was as good and as unhurried before the ru' as after, with different consequences, however, if the matter has been brought into the record on review by the grant or denial of a motion after verdict for judgment below.

This Court has held that where the motion in the nature of a motion for judgment *non obstante veredicto* was not made in the District Court, that fact is reason for denying to the Circuit Court of Appeals power on such a record to order judgment contrary to the verdict below. The case is *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389, 392, 394, 395. The point appears from the following from this Court's opinion:

> "The court refused to direct for plaintiff or defendants and, without reserving for later consideration the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial but did not move for judgments non obstante veredicto. The court denied the motions and entered judgments for defendants."
>
> * * * "The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requesting binding instructions has been reserved or declined, the party presenting the point may move the court for judgment non obstante veredicto; whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should

have been entered upon the evidence. From the judgment thus entered either party may appeal to the supreme or superior court which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court. As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts. The Conformity Act does not extend to the Circuit Court of Appeals. In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff."

The Circuit Court of Appeals in the case at bar supported its disregard of the lack of a motion for judgment in accordance with the denied motion for a directed verdict, and the lack of any consideration or action by the trial court subsequent to verdict, by saying they found nothing in Rule 50 (b) to restrict its power to direct entry of judgment.

The court below found nothing in Rule 50 (b) that restricts their power to direct the entry of judgment by the lower court in favor of the defendant rather than to order the granting of a new trial. The court below further states that defendant was *permitted* under Rule 50 (b) to file a motion after verdict. The court's position in this regard is believed to be erroneous because as we view the rule the defendant was *required* to file a motion after verdict in order to justify the action taken by the Circuit Court of Appeals here.

The action of the court below is directly contrary to the holding of the decision of this Court in *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 57 L. Ed. 879, with which case this Court is familiar. This action in remanding the case with instructions to direct a verdict was grounded upon the following cases:

Conway v. *O'Brien* (2 Cir.), 111 F. (2d) 611, 613;
Eastern Livestock Cooperative Marketing Ass'n, Inc., v. *Dickenson* (4 Cir.), 107 F. (2d) 116, 120;
Lowden v. *Denton* (8 Cir.), 110 F. (2d) 274, 278.

The decision of the Second Circuit in the case of *Conway* v. *O'Brien* is grounded upon the case of *Leader* v. *Apex Hosiery*, 108 F. (2d) 71, and *Massachusetts Protective Association* v. *Mouber* (8 Cir.), 110 F. (2d) 203, in both of which cases motions for verdict *non obstante veredicto* were made. Therefore these decisions are no basis for the action taken by the Second Circuit in the *Conway* case.

The decision of the Circuit Court is based in part upon the *Conway* case. Therefore if the *Conway* case is grounded upon cases which do not support its decision, it follows necessarily that it must fall, and therefore that part of the instant decision of the court below using the *Conway* case as a basis must likewise fall.

In the case of *Eastern Livestock Corp.* v. *Dickenson*, 107 F. (2d) 116, cited by the court below a motion was made in the trial court to set aside the verdict.

In the case of *Lowden* v. *Denton*, 110 F. (2d) 274, relied upon by the court below a motion was made to set aside the verdict in that case after judgment in accordance with the motion for directed verdict at the close of the evidence. The record of the Circuit Court of Appeals became the record of the United States Supreme Court and such record was filed in this Court May 17, 1940. See pages 11-13 of that record.

In *Brunet* v. *S. S. Kresge Co.* (C. C. A. 7 decided Nov. 20, 1940), cited by the court below in support of his opinion a motion *non obstante veredicto* was made.

Also, in *Willis* v. *Pennsylvania Railroad Co.*, 35 Fed. Supp. 941, there was a subsequent motion after verdict.

In the case of *Montgomery Ward* v. *Duncan*, decided De-

cember 9, 1940, by this Court, the question here involved was not there presented, that case merely holding that motions for new trial were for the trial courts. This decision has nothing to do with the questions here involved.

In the case of *Demers* v. *Railway Express Agency*, 108 F. (2d) 107, a motion was filed after verdict.

III. The opinions of this and other courts imply that the motion required by Rule 50 (b) for judgment non obstante veredicto is essential to confer authority on the Circuit Court of Appeals to affirm or reverse the District Court without requiring a new trial.

The following cases imply a view contrary to that of the court below:

Ferro Concrete Const. Co. v. *United States*, 112 F. (2d) 488, 492, C. C. A. 1, where the court said:

> "The defendant having moved seasonably that the verdict and judgment thereon be set aside and to have judgment entered in accordance with its motion for a directed verdict, there is no occasion for a new trial of the issues involved in the plaintiff's claim."

In *Lowden* v. *Denton*, 110 F. (2d) 274, 278 (C. C. A. 8), the court said:

> "In this instant case, the defendants have meticulously complied with the provisions of this Rule" (50 b) "of court, and hence, on the record now before us and under the circumstances disclosed thereby, are entitled on reversal to have the case remanded with directions to enter judgment for the defendants."

In *Reliance Life Ins. Co.* v. *Burgess*, 112 F. (2d) 234, 240, C. C. A. 8, the court said:

> "Plaintiff made a motion for judgment notwithstanding the verdict, which was denied. It follows that the judgment appealed from should be reversed and the

cause remanded with directions to enter judgment for the plaintiff. Rule 50, Rules of Civil Procedure; Massachusetts Protective Assn. *v.* Mouber, 8 Cir., 110 F. (2d) 203; Lowden *v.* Denton, 8 Cir., 110 F. (2d) 274."

In the case of *Pruitt* v. *Hardware Dealers Mut. Fire Ins. Co.*, 112 F. (2d) 140, 143 (C. C. A. 5), Circuit Court Judge Sibley carefully considered Rule 50 (b).

Conclusion.

It is respectfully submitted that the errors of the Circuit Court of Appeals above discussed, in holding that the District Court erred in not directing a verdict for the respondent, and in directing a judgment notwithstanding the verdict instead of directing a new trial, are such as call for review and determination by this Honorable Court.

Respectfully submitted,

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(7000)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 101

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S BRIEF.

R. K. WISE,
WARREN E. MILLER,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

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JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY,

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THE UNITED STATES OF AMERICA.

PETITIONER'S BRIEF.

Opinions Below.

The opinion of the District Court at the time motion for new trial was overruled, is set forth on pages 44 and 45 of the record.

The opinion of the Circuit Court of Appeals (R. 51-58) is reported in 116 F. (2d) 812.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered January 9, 1941 (R. 58). Petition for rehearing was filed February 7, 1941 (R. 59-64), and was denied March 10, 1941. The petition for a writ of certiorari was filed May 22, 1941, and granted October 13, 1941.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Questions Presented.

1. Whether the Circuit Court of Appeals violated the general common law relating to trials by jury and denied trial by jury to petitioner in violation of the Seventh Amendment of the Federal Constitution in determining that there was no evidence upon which the jury might find petitioner-appellee totally and permanently disabled, testimony which the jury apparently believed, thus usurping the functions of the jury by invading their province with respect to the testimony.

2. Whether the new Federal Rule 50 (b) which expressly provides that whenever a motion for directed verdict at the close of the evidence is denied, the Court is deemed to have submitted the action to the jury, subject to a later determination of the legal questions raised by the motion, and which further provides that within ten days after the reception of the verdict, the party who has moved for a directed verdict may move to have the verdict and judgment thereon set aside and to have judgment entered in accordance with his prior motion, is to be construed as though it provided that if the party does not within ten days or at any time after the return of the verdict move to set the verdict and judgment aside and to have contrary judgment entered, such a motion shall, nevertheless, be deemed to have been made and denied. Otherwise expressed, whether a party need not seek a judgment *non obstante veredicto* in the District Court, nor the District Court consider the entry of one, in order to find a direction by the Circuit Court of Appeals that such a judgment should have been entered in the District Court, thus attributing to the District Court error in failing to do what the District Court was not asked to do.

Provisions of Constitution, Statutes and Court Rule Involved.

The Seventh Amendment to the Federal Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Section 400 of the Act of October 6, 1917, c. 105, 40 Stat. 398, 409, provides as follows:

> That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protections for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon payment of the premiums as hereinafter provided.

This section was restated in substance in subsequent amendments (U. S. C., Title 38, Sec. 511; U. S. C., Sup. VII, Title 38, Sec. 511).

In Treasury Decision 20, Bureau of War Risk Insurance, dated March 9, 1918, "permanent and total disability" was defined as follows:

> "Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.

"Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *"

Title 38, U. S. C. A., Supp. Section 445 provides:

"In the event of disagreements as to claim, including claim for refund of premiums, under a contract of insurance between the Veterans' Administration and any person or persons claiming thereunder an action on the claim may be brought against the United States either in the district court of the United States for the District of Columbia or in the district court of the United States in and for the district in which such persons or any one of them resides, and jurisdiction is hereby conferred upon such courts to hear and determine all such controversies."

The Act of June 19, 1934, c. 651, paragraphs 1, 2; 48 Stat. 1064, 28 U. S. C., paragraphs 723 b, 723 c, provides:

Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by the general rules, for the district courts of the United States * * * the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. *Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.*

Sec. 2. The Court may at any time write the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both; *Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate.* * * * (Italics supplied.)

Rule 50 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States states:

"Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the

evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, *a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict;* or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." (Italics supplied.)

Statement.

The petitioner, plaintiff-appellee below, recovered judgment against the respondent in the District Court of the United States for the Western District of South Carolina, on the verdict of a jury (R. 45), for total permanent disability benefits under a contract of yearly renewable war risk term insurance, judgment being entered by the District Court for the sum of $57.50 per month in petitioner's favor beginning April 2, 1919.

At the conclusion of the evidence, respondent-appellant moved for a directed verdict.

Respondent-appellant appealed, presenting the question of whether there was substantial evidence that the insured became totally and permanently disabled, and whether the trial court erred in excluding evidence and in charging the jury.

The United States Circuit Court of Appeals for the Fourth Circuit, in the decision now sought to be reviewed (R. 51-58) which is reported in 116 F. (2d) at page 812, held that there was no substantial evidence to prove that the insured was totally and permanently disabled. Having so decided, the Court of Appeals reversed and remanded the cause, not for a new trial, *but with direction to enter judgment in favor of the United States, respondent appellant, although no motion for a judgment despite the verdict had been made*, nor did the record show any consideration by the District Court subsequent to the verdict of the question which had been raised by a motion for a directed verdict.

BRIEF OF ARGUMENT.

Point I.

THERE WAS AMPLE EVIDENCE TO SUPPORT THE VERDICT OF THE JURY THAT PETITIONER WAS TOTALLY AND PERMANENTLY DISABLED.

Point II.

ASSUMING (WITHOUT ADMITTING) THE CIRCUIT COURT OF APPEALS WAS CORRECT IN REVERSING THE ACTION OF THE TRIAL COURT, STILL ITS ACTION IN REMANDING THIS CASE TO THE DISTRICT COURT WITH DIRECTIONS TO ENTER JUDGMENT IN FAVOR OF THE UNITED STATES WAS ERRONEOUS.

Argument.

Point I.

There was ample evidence to support the verdict of the jury that petitioner was totally and permanently disabled.

The only law questions here presented for consideration are the rulings of the Circuit Court of Appeals (1) that "there was no substantial evidence to prove that the insured was totally and permanently disabled when his insurance was in force (R. 51)," and (2) in remanding this case to the District Court with instructions to enter judgment in favor of the United States. Although the Circuit Court of Appeals (R. 55) commented upon the ruling of the District Judge upon the admissibility of evidence, such remarks by the court below were purely dicta, as the opinion indicates it was unnecessary to consider the correctness of such rulings on the evidence by the District Judge. Hence, that question is not now before this Court.

Plaintiff has been deprived of a *substantive right* by the erroneous action of the court below, to wit, his right to a trial by jury.

The Act of June 19, 1934, 49 Stat. 1064, 28 U. S. C. paragraph 723 (b) and 723 (c), which empowered this Court to prescribe general rules regarding procedure in said courts, also provides: "*Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.*

"Sec. 2. The court may at any time write the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both; *Provided, however, that in such union of rules the right of trial by jury as at common law and declared by the Seventh Amendment to the Constitution shall be preserved to the parties inviolate* • • •."

Plaintiff's right to a jury trial, even if the action of the trial court in reversing the judgment should be held by this Court to be correct (which we do not concede) was a *substantive right*. The new rules of civil procedure do not affect any *substantive rights* of a litigant, and hence do not affect petitioner's right to a jury trial. (Act of June 19, 1934, c. 651, sec. 1, 48 Stat. 1064.)

In the absence of any Federal statute authorizing the Circuit Court of Appeals to act as it did here, such action was without sanction or authority of law, and therefore void.

The right of the Circuit Court of Appeals to remand this case with direction to dismiss without another trial, is not authorized by the Federal Rules of Civil Procedure, for the reason that there was no compliance with the only provision of the rules that could possibly have authorized this action; to wit, no motion was made by the defendant *non obstante veredicto*.

Before examining the evidence in this case, the court's attention is invited to the pertinent comment of the District Judge who had ample opportunity to observe the witnesses, as appears in the record. When he charged the jury he said (R. 39):

> "Dr. Land said in his opinion there would have been a complete collapse of mind and body if he had worked. You have to take that into consideration. That is the only medical evidence on that point in the case, and I think it proper and appropriate to call that to your attention."

The order of the District Court overruling defendant's motion for a new trial (R. 44-45) which was doubtless prepared by the District Judge after ample opportunity for reflection and deliberation states:

> "I am of the opinion that there was ample evidence to go to the jury in this case. The Government records showed that the veteran was not in good physical condition when he was discharged from the Army. He was given vocational training at Waynesville, N. C., and at the University of Georgia, but the testimony was and the record showed that his training was frequently interrupted on account of his physical and mental condition. The veteran's wife who is his committee, and who was a school teacher prior to their marriage in 1921, made a very impressive witness. She testified that the veteran was in bad physical condition and extremely nervous even before their marriage in 1921; (fol. 75) that soon after their marriage she discovered that the veteran was mentally unbalanced, that he was suspicious of her and all the neighbors, was afraid that someone would poison him, and he threatened to kill her and all of the children and commit suicide. Several of the neighbors testified that the veteran appeared to be sick, was very contentious and suspicious, and was on bad terms with all of his neighbors."

Dr. J. N. Land testified that he had known the veteran since he was a boy; that he had been the physician of his mother's family before the War and had seen the veteran quite regularly since he returned from the Army; that he had considered him both physically and mentally unfit for work since his discharge; and that any sustained effort would, in his opinion, have brought about a complete collapse of the veteran physically and mentally.

The Government offered little testimony to offset the plaintiff's case other than the testimony of Dr. C. H. Young, who examined and passed the veteran for a life insurance policy. But, on cross-examination, Dr. Young admitted that he had made no mental examination of the veteran and that in such an examination as he made it would not be unusual for him to overlook the veteran's mental condition, (fol. 76) and that one might easily conceal the fact that he was mentally deranged on such an examination. The Agent who represented the insurance company for which Dr. Young had made the examination testified that a substandard policy was issued to the veteran and that it was not accepted by him.

I am of the opinion that the jury returned a proper verdict in this case and I am convinced that if a new trial were granted, another jury would come to the same conclusion.

Upon admitted facts, if reasonable men might differ as to whether the insured was totally and permanently disabled as found by the jury the question was for the jury. Here facts were in dispute which were assumed by the Circuit Court of Appeals less favorable to petitioner than the evidence warranted.

It is significant that the court below at no place in its opinion reciting the facts upon which it found the evidence to be insubstantial referred to the fundamental rule that in determining a motion for a directed verdict the court

must assume that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish, and all the inferences fairly deducible from the facts should be drawn in favor of the opposing party. See *Gunning* v. *Cooley*, 281 U. S. 90, 94; *Richmond & Danville R. R.* v. *Powers*, 149 U. S. 43, 45; *Texas & Pacific Ry.* v. *Cox*, 145 U. S. 593, 606; *Railroad Co.* v. *Stout*, 17 Wall. 657, 663.

Abundant substantial evidence, medical and lay testimony and record evidence appears in this record. Plaintiff introduced one physician and seven lay witnesses. Defendant introduced one physician and but one lay witness. Government records showing plaintiff's nervous condition prior to his discharge from the Army and reports of medical examiners and hospital records after his discharge from the Army were introduced.

Dr. J. N. Land, who knew the insured practically all his life (R. 22), described his mental condition as psychoneurosis and said he was a hypochondriac. The witness testified (R. 22-23):

> "He is the talking type insanity. He has talked to me every chance he has got since 1919. He wants to know if I can do anything for him; that nobody else can do anything for him. He has not been friendly to me at all times. I have never done him any harm. He does talk about me. I just go ahead and do the best I can for him. I would say his mental condition would keep him from working. He is not able to judge the necessity of the thing to be done about his business. *I would not have advised him to do any work since he has been out of the army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically.*" (Italics supplied.)

This evidence is substantial and shows that the insured was unable to work without it being harmful to him. This

Court in the *Lumbra* case, 290 U. S. 551 (at page 560) stated:

> "The mere fact that one has done some work after the lapse of his policy is not of itself sufficient to defeat his claim of total permanent disability. *He may have worked when really unable and at the risk of endangering his health or life.*" (Italics supplied.)

This Court in the *Lumbra* case cited favorably the following cases:

United States v. *Phillips* (C. C. A. 8) 44 F. (2d) 689, 691;
United States v. *Godfrey* (C. C. A. 1) 47 F. (2d) 126;
Carter v. *United States* (C. C. A. 4) 49 F. (2d) 221, 223;
United States v. *Lawson* (C. C. A. 9) 50 F. (2d) 646, 651;
Nicolay v. *United States* (C. C. A. 10) 51 F. (2d) 170, 173.

Here every element which is usually pointed out in opinions as making against the claim of total and permanent disability is absent; those which make for it, present.

The Court properly charged the jury (R. 39):

> "• • • *whether or not that person became so disabled by such impairment of mind or body that he was thereafter unable to follow continuously any substantially gainful occupation, without serious impairment to either mind or body. Suppose he tried to follow a substantially gainful occupation and the doctor told him, 'If you do that, it is going to seriously impair your body or mind.' I think it proper to call your attention to this, that the only testimony on that point was by Dr. Land. He said that in his opinion there would have been a complete collapse of mind and body if he had worked. You have to take that into consideration. That is the only medical evidence on that point in the case, and I think it proper and appropriate to call that to your attention.*" • • • (Italics supplied.)

The Circuit Court of Appeals, in commenting upon this testimony of Dr. Land (R. 52) stated that it had little probative force, basing its opinion, among other things, on the fact that the doctor did not make a *physical* examination of the insured until about six years before trial. However, this suit is based upon a *mental* condition.

Even though the testimony might have but "little" probative force when weighed by the court below, yet its "probative force" was for the *jury* to determine and not for the Circuit Court of Appeals to weigh, as it did here. In doing so, it usurped the function of the jury.

The court below was apparently largely influenced by the fact that the plaintiff had only one medical witness (R. 52). It was apparently proceeding upon the assumption that in order for an insane insured to recover total and permanent disability benefits he must produce considerable expert medical testimony. In this, its action was contrary to the opinion of this Court in the Case of *Connecticut Mutual Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 28 L. Ed. 538, where this Court stated:

> "Counsel for the plaintiff in error contends that witnesses who are not experts in medical science may not, under any circumstances, express their judgment as to the sane or insane state of a person's mind. This position, it must be conceded, finds some support in some adjudged cases as well as in some elementary treatises on evidence. But, in our opinion, it cannot be sustained consistently with the weight of authority, nor without closing an important avenue of truth in many, if not in every case, civil and criminal, which involves the question of insanity. Whether an individual is insane, is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common sense, and we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which

all men have more or less knowledge, according to their mental capacity and habits of observation; matters about which they may and do form opinions, sufficiently satisfactory to constitute the basis of action. * * * The extent to which such opinions should influence or control the judgment of the court or jury must depend upon the intelligence of the witness, as manifested by his examination, and upon his opportunities to ascertain all the circumstances that should properly affect any conclusion reached."

Doctor Land testified (R. 23):

"He is not physically in good shape, and is mentally in bad shape. *When he got out of the Army I didn't hold any hope for his recovery*, a man in his condition will go from bad to worse. I think he has gradually progressed since he came out of the Army. I was instrumental in having a committee appointed for him.

"The report of February, 1921 shows hypochondriasis, that is, a morbid, imaginative condition. A hypochondriac imagines everything. He imagines his best friends are his enemies. As a matter of fact, in my conversations with this man he has dwelled (R. 23) on the fact that everyone of his neighbors and his old friends are doing everything that they can to double-cross him, as he expresses it. That follows that line of mental disability. You never find two mental cases exactly alike. * * *" (Italics supplied.)

(R. 25) "I thought he was a crazy man. * * * I know I tried to get him in (R. 26) the Columbia Hospital and they refused to take him. That was in 1937. * * *"

(R. 26) "My opinion about his mental condition since 1919 is based on my own knowledge, and not on what somebody else told me.

"Q. I believe you have already said that your prognosis back in 1919 was that you never did think he would recover. Has that been verified by the fact that he is in the same condition now or probably a little worse than he was back in 1919?

A. Yes, sir. * * *"

The trial court, who had the opportunity to observe the witnesses (a privilege which the court below did not enjoy), in commenting on the insured's wife's testimony, said (R. 44):

> "*The veteran's wife* * * * *made a very impressive witness.*"

The insured's wife, who first met him in 1913, testified (R. 5):

> * * * "We were married on April 16, 1921, at which time he was taking vocational training, training to rehabilitate himself so he could do something after the War, but he never could do anything. He was taking training in Waynesville, North Carolina, and I went there. From there we went to Athens, Georgia, and stayed for about a year and a half, while he continued taking vocational training. While in Waynesville, his condition did not improve, nor did he get any better in Georgia. After leaving Georgia, we came out to the little farm and he tried to work in 1924.
>
> "(R. 5) With reference to his condition at the time we were married, he was far from well. He complained all the time of his stomach, his heart, and his kidneys. As a result of trying to work on the farm, he became more nervous and couldn't sleep, and couldn't retain his food. It just upset him all the time. *That has continued to be true up to the present time.* He could not work all day. He worked maybe an hour or two. * * *" (Italics supplied.)

This testimony coming from a person who had an opportunity continuously to observe the insured shows that working actually was harmful to him. The court below did not draw proper inferences from this testimony. The weight to be accorded this testimony was for the jury to pass upon, and undoubtedly it believed this witness and accorded her testimony and that of Dr. Land due weight.

The insured's wife further testified (R. 5):

"* * * With reference to his mental condition, he was suspicious of everybody. That has been true since his discharge from service. He is suspicious of his neighbors too. He thinks they are all against him. He thinks everybody is against him. He has threatened to commit suicide and to kill me and the children and all. I would leave several times and go to my mother's and stay until he would get a little better. I would always go back home. He doesn't like to go off and eat away from home at all because, for one thing, he is afraid somebody is going to poison him. I do all of the cooking myself at home and he stays right with me. He doesn't like to go to a hospital. Sometimes he pours his own medicine. He thinks he is going to be poisoned. When I mention Augusta, *he says he would rather die than go there.* He (R. 5) has been in the hospitals at Columbia, South Carolina, and Roanoke, Virginia. He has been to Greenville before we were married, and Oteen. * * *"

* * * * * * *

"Q. His this condition improved any since you were married?

"A. None whatever.

"Q. Is it any worse?

"A. Well, he is harder to control now than he was at first."

The jury was justified in believing from the foregoing testimony that the insured's condition had not improved from April 16, 1921 when he was married until the date of the trial; and if his condition did not change in this period of time it was justified in concluding that it was reasonably certain that it would continue throughout the remainder of his life.

It was aptly stated by a Federal district judge, in a war risk insurance case (*McGovern* v. *United States*, 294 Fed. 108, affirmed 299 Fed. 302, Cert. dis. 267, U. S. 608):

"As permanency of any condition (here, total disability) involves the element of time, the event of its

> continuance during the passage of time is competent and cogent evidence."

This was a proper inference to be deduced from the foregoing testimony, but the Court of Appeals did not take this view of the evidence, favorable to the insured.

The Court of Appeals apparently penalizes the insured because his wife did not send him to a mental hospital. This is not only failing to give the evidence here all the proper inferences as required by decision of this Court in *Gunning* v. *Cooley*, 281 U. S. 90, but penalizes this mentally incompetent insured because of something his wife did not do which apparently the Circuit Court of Appeals felt she should have done.

It is common knowledge that many persons abhor being patients in hospitals. Particularly is this true of a person suffering from mental ailments as was this insured; and particularly did he loathe the hospital at Augusta, Georgia. Persons with mental impairments are not held to the strictest rule of human conduct under the law, but notwithstanding this, the court below held this crazy man to the same degree of care that it would impute to a sane man.

The court below apparently takes the position that it was incumbent upon the insured to secure adequate hospitalization, notwithstanding evidence of record here from Doctor Land that he tried to get him in the government hospital in Columbia but the government would not take him (R. 26). In this connection Doctor Land testified (R. 25):

> "* * * I thought he was a crazy man (R. 25). * * * I know I tried to get him in the Columbia Hospital and they refused to take him. That was in 1937. They refused to take him and suggested that he be taken to Augusta, Georgia and they discharged him from the hospital in Roanoke as mentally competent, yet they wouldn't take him for intestinal trouble in Columbia. I wrote them a letter asking why, if he was

> mentally competent when he was discharged from Roanoke, they wouldn't take him in Columbia for intestinal trouble and wanted to send him to Augusta. I asked that question and they never answered it. * * *" (R. 25) Hospitals have not always been available.

The Circuit Court of Appeals gave to the facts in this case a much less favorable view than the evidence warranted on the question of hospitalization. It apparently overlooked entirely the above quoted testimony of Doctor Land in this regard, the apathy of the insured to hospitals, the fact that one suffering from a mental condition would rather be around their loved ones than behind the bars of a government insane asylum, and the fact that his own physician could not get the government to hospitalize him; and in addition the Circuit Court of Appeals placed upon this mentally incompetent disabled World War Veteran the burden of knowing what was best for him and erroneously penalized him for the failure of his wife to send him to an insane asylum against his wishes although she thought it would be a good thing. The Circuit Court of Appeals, in placing this construction upon this testimony, overlooked the human element which doubtless appealed to this jury, who doubtless gave weight to this testimony, based upon their experience in life. This petitioner was denied by the Court of Appeals the most favorable inferences which should be drawn from this testimony. Clearly, the court below placed upon this testimony inferences most favorable to the defendant below and substituted its opinion in weighing the facts for that of the jury, thus violating the 7th Amendment, and the rule enunciated by this Court in *Gunning* v. *Cooley*, *supra*.

Particularly is it significant in the instant case that the United States produced no witness to contradict the testimony of Doctor Land or any one of petitioner's seven lay witnesses. Defendant's only medical witness, Doctor

Young, testified (R. 33) that no mental examination was made by him of the insured and admitted that it was not unusual to examine a person physically and overlook the (R. 33) "mental side" and that very often the patient can conceal the fact of mental abnormality from the physician who makes a physical examination.

The court below cites the case of *Mikell* v. *United States*, 64 F. (2d) 301, a case of chronic *appendicitis*; *United States* v. *Ennis*, 73 F. (2d) 310, a case of *tuberculosis*; *United States* v. *Marsh*, 107 F. (2d) 173, a case involving *appendicitis* and *adhesions*; *Neely* v. *United States*, 115 F. (2d) 448, a case involving *arrested tuberculosis*, as authority for the proposition that the conduct of this insured, who is *insane*, is governed by the same rules as the conduct of a sane person. None of the cases cited by the court below involve an *insane man* as authority for the proposition that this insane veteran should be charged with the failure of the government to adequately hospitalize him. This portion of the decision of the court below is contrary to the reasoning in the decision of the Fifth Circuit in the case of *Gilmore* v. *United States*, 93 F. (2d) 774, where that court at page 777 stated:

> * * * "but an inference drawn by a process of probable reasoning from the conduct of an ordinarily prudent person does not rationally follow from the same conduct of one who is insane * * *."

In the case of *Cox* v. *United States*, 24 F. (2d) 944, which was a case involving the war risk insurance contract of a mentally incompetent person, the Fifth Circuit Court of Appeals stated:

> "As an interdict he was incapable of entering into a legal contract of employment, and it is reasonably certain that he could not have secured employment from any but a friend who would put up with his idiosyn-

crasies. Ability to continuously follow a substantial, gainful occupation implies *ability to compete with men of sound mind and average attainments under the usual conditions of life.* Argument is not needed to demonstrate that one who has been officially declared insane and has exhibited the vagaries that Cox did could not successfully so compete, although he might have lucid intervals in which he could render satisfactory service. This conclusion finds support in the reasoning of the court in the following cases: Starnes *v.* U. S. (D. C.), 13 F. (2d) 212; Jogodnigg *v.* U. S. (D. C.), 295 Fed. 916; Forbes, Dir., *v.* Welch (App. D. C.), 286 Fed. 866." (Italics supplied.)

The fact that this insured had a committee has evidentiary bearing upon the question of his total and permanent disability. (*Forbes* v. *Welch*, 286 F. (2d) 765.)

As was said by the court in *United States* v. *Newcomer*, 78 F. (2d) 50, where there was a substantial work record:

> * * * "His mental condition prevents him from working as other human beings work. He is not monarch of his mind. There is lack of coordination between his mind and his body, and as said by us in Asher *v.* United States (C. C. A. 8) 63 F. (2d) 20, 23:
>
> "'True, the record shows that insured has been able to do some work. He could do some work like the ox of the field, when guided and directed, but not as an intelligent human being. * * *'"

In the case of *Jagodnigg* v. *United States*, 295 Fed. 916, a war risk insurance case in which the court held the insured to be permanently and totally disabled, after reciting the definition of total and permanent disability said:

> "This certainly does not mean that the requirements 'to follow continuously any substantially gainful occupation' shall be satisfied by the performance of some negligible duties under supervision and direction of a guardian or caretaker. What is meant is clearly the

ability of the soldier to earn substantially through *independent effort*. This young man has physical strength, but he is less than a child in mind. He has been judicially held to be capable of handling his affairs. He is under guardianship, * * *."

The facts in this case are much stronger from petitioner's standpoint than those in the case of *Berry* v. *United States*, 85 L. Ed. 576, where this Court held:

"* * * It was not necessary that petitioner be bedridden, wholly helpless, or that he should abandon every possible effort to work in order for the jury to find that he was totally and permanently disabled. * * *" (*Citing Lumbra* v. *United States*, 290 U. S. 551.)

"It cannot be doubted that if *petitioner had refrained from trying to do any work at all*, and the same evidence of physical impairment which appears in this record had been offered, a jury could have properly found him totally and permanently disabled. And the jury could have found that his efforts to work—all of which sooner or later resulted in failure—were made not because of his ability to work but because of his unwillingness to live a life of idleness, even though totally and permanently disabled within the meaning of his policies" (citing *United States* v. *Rice*, 72 F. (2d) 676; *Nicolay* v. *United States*, 51 F. (2d) 170, 173; *United States* v. *Lawson*, 50 F. (2d) 646, 651; *United States* v. *Godfrey*, 47 F. (2d) 126, 127; *United States* v. *Phillips*, 44 F. (2d) 689, 691).

It is significant that in the instant case appellant produced no witness to contradict the evidence of Doctor Land or anyone of appellee's seven lay witnesses. Doctor Young, the only medical witness called by appellant, testified (R. 45):

"* * * A mental examination was not made at all." * * *

He further testified:

> "* * * You cannot always determine from talking to a man on the first examination whether he is mentally all right. It requires more than that, yes, sir.
>
> "It is not unusual to examine a man physically and to overlook the mental side, that is quite right. Very often, even over a long period of observation the patient can conceal the fact that there is abnormality so far as mental condition is concerned. * * *"

The official records of the War Department show (R. 27) that on September 7, 1918, the insured was *very nervous*, his spine was very tender, and the processes of a vertebrae seemed to be out of line. He gave the impression of having neurasthenia (R. 28). He was inducted into the service June 24, 1918, was sent to Camp Jackson, South Carolina, sailed for France, August 27, 1918, and on September 22, 1918, he hurt his back, was sent to Camp Hospital No. 33 and placed in a plaster of Paris jacket. He had vomiting spells, was transferred to Base Hospital No. 65 a few weeks later, and then returned to the United States.

The records further show that while in the government hospital (R. 28), "is *nervous*, troubled with pain in lumbar region, on moving about. These latter pains are transferred down the legs at times. Hyperacidity in stomach. *Looks nervous*, but not particularly sick." (Italics supplied.)

Various examination reports showed nervousness and diagnoses of psychoneurosis, neurasthenic type (R. 20), and psychosis, neurasthenic type, was made. The last diagnosis (R. 20) showed neurasthenia. Clearly, he did not improve.

Crymes W. Halliday, the insured's brother, testified (R. 26-27):

> "I am a brother of the plaintiff. Prior to our entry into the Army we both worked at the Anderson Brothers Dry Goods Store and were paid $100.00 a month or $25.00 a week. When they moved the firm to Green-

wood from Anderson, my brother got $150.00 a month. When I first saw my brother after his return from the Army, his condition physically and mentally was practically the same as it is today. I would say he was a complete physical and mental wreck, very badly torn up physically and mentally."

Upon the insured's discharge from the service (R. 17) he was altogether a different man. When he tried to work he appeared to have no strength. When he returned from the Army (R. 16) he did not have a grip upon himself because of nervousness, and lacked control of himself.

Henry Jackson, a cotton buyer, testified that before the insured entered the Army, he was strong and in good shape (R. 15); but for the last several years he has been in a highly nervous state, and appeared in pretty bad shape from a nervous standpoint.

Doctor Land testified (R. 24):

"Neurosis is nervousness and psychoneurosis is a disease in which the brain is unbalanced to the point that they imagine almost anything."

"Q. Imagines he was sick?"

"A. Imagines he was sick."

It seems unreasonable that a country boy who before going into the service was a successful clerk in a store who made $100.00 a month and then was promoted to $150.00 a month would return to his home from the service and refuse to do any work or attempt to follow a gainful occupation unless he was mentally unable to do so. It is not uncommon for a man who is *physically* disabled to continue working until death overtakes him, but when a person who is *mentally* disabled and thinks he is sick at all times and that everyone in the community is against him and is suspicious of people doing things to him, this type of man cannot work even though efforts are made to force him. This is the picture of this veteran, James H. Halliday.

POINT II.

Assuming (without admitting) the Circuit Court of Appeals was correct in reversing the action of the trial court, still its action in remanding this case to the District Court with directions to enter judgment in favor of the United States was erroneous.

In the cases of *Conway* v. *O'Brien*, No. 344, October Term, 1940 (85 L. Ed., Adv. 575) and *Berry* v. *United States*, No. 336, October Term, 1940 (85 L. Ed., Adv. 576), where the lower court's construction of Rule 50 (b) of the Rules of Civil Procedure was involved the same two questions presented in the instant case were involved, to-wit, the question of substantial evidence and the construction placed upon Rule 50 (b) by the Circuit Court of Appeals in those two cases. However, this Court did not pass upon Rule 50 (b), holding that the facts were sufficient in each of those cases to justify their submission to the jury. We believe that this case should be acted upon in the same manner that this Court followed in those two cases because the record here indicates evidence from which the jury properly reached the construction that petitioner was totally and permanently disabled.

However, if this Court should be of the opinion that the District Court incorrectly appraised the law and facts (which petitioner in nowise concedes), then the action of the Circuit Court of Appeals in this case in remanding to the District Court with instructions to enter judgment in favor of the United States should be reversed as it was erroneous.

The order of the Circuit Court of Appeals for the entry of judgment contrary to the verdict deprives petitioner of his right of trial by jury, contrary to the 7th Amendment to the Constitution, which provides:

"In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Rule 50 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States states:

"Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

No motion was made by the respondent as permitted by this rule to have the verdict and judgment set aside and to have judgment entered in accordance with his motion for a directed verdict, within ten days after the reception of the verdict or at any time, nor was any action of any kind taken until the taking of an appeal to the Circuit Court of Appeals, nor was there then any action other than the taking of the appeal and the making up of the record on appeal. The facts which the court below found could have been

found by the jury on the testimony. It certainly can not be said, however, that the facts which the court found were those most favorable to the plaintiff which could be founded upon the testimony. It has been the long settled law that the verdict of a jury is not to be directed, or upset, unless the latter is true.

The opinion of the Circuit Court of Appeals gives the general outline of the facts, though it understates some upon which petitioner relied, and chooses between the conflicting testimony a version different from that which it may be fairly assumed the jury believed. The facts are stated herein in detail under Point I.

In justification for the decision to direct the dismissal of the complaint instead of a new trial, the Circuit Court of Appeals states, in effect, that the procedure outlined in Rule 50 (b) need not be followed in order that the Circuit Court of Appeals may adjudge that a motion for judgment despite the verdict (never made here) should have been granted (R. 57).

The court below recognizes in its opinion that it was entering judgment notwithstanding the fact that its action was contrary to the expressed provision of Rule 50 (b). It stated (R. 57):

> "* * * We think it would have been the course of wisdom in the instant case for the Government to make in the lower court the motion for judgment notwithstanding the verdict. Yet we find nothing in the rule that restricts our power, as indicated in the case of Baltimore & Carolina Line *v.* Redman, 295 U. S. 654, 55 S. Ct. 890, 79 L. Ed. 1636, to direct the entry of judgment by the lower court in favor of the defendant, rather than to order the granting of a new trial, when the orderly administration of justice seems to require it. And this seems none the less true even though the verdict of the judge was here in favor of the plaintiff, and even though here the defendant failed to file (as

> he is permitted under Rule 50 b) in the lower court a motion, after the verdict, 'to have judgment entered in accordance with his motion for a directed verdict.' "

The learned court cites in support of its position certain decisions which however are not controlling as will be more fully discussed in the brief filed in support hereof. One of the decisions cited by the court below as its authority for the action taken here was the case of *Conway* v. *O'Brien*, Second Circuit, 111 F. (2d) 611. However, as previously stated, this Court did not pass upon this question in the *Conway* case.

In the case of *Berry* v. *United States*, No. 366, October Term, 1940, 85 L. Ed. (Advance Sheets, page 576) this Court, in its opinion of March 3, 1941, recognized the fact that the Circuit Courts of Appeal are not in complete agreement upon the question here presented, yet this Court in the *Berry* case held that there was no occasion to decide the question here presented because this Court held that in that case the Circuit Court of Appeals erred as there was evidence from which a jury could reach the conclusion that the insured was totally and permanently disabled.

In the *Berry* case, this Court stated:

> "Rule 50 (b) goes further than the old practice in that district judges, under certain circumstances, are now expressly declared to have the right (but not the mandatory duty) to enter a judgment contrary to the jury's without granting a new trial. But that rule has not taken away from juries and given to judges any part of the exclusive power of juries to weigh evidence and determine contested issues of fact—a jury being the constitutional tribunal provided for trying facts in courts of law."

In this Court's opinion in the *Berry* case it mentioned the decision of the court below in the instant case in its footnote No. 3 when it made the statement that the Circuit

Courts of Appeal are not in agreement upon this important question of law.

It is believed that the Fifth Circuit Court of Appeals in the case of *Pruitt et al.* v. *Hardware Dealers Mutual Fire Ins. Company*, 112 F. (2d) 140, correctly states the applicable law and should be followed by this Court. In that case Circuit Judge Sibley held, at page 143:

> "It follows that the judgment for the defendant notwithstanding the verdict ought not to have been entered and must be reversed. Appellants thereupon contend that we should order a judgment entered on the verdict, as was done in *Duncan* v. *Montgomery Ward & Co.*, 8 Cir., 108 F. (2d) 848, 853. That, we think, would be a misapplication of Rule of Civil Procedure 50 (b). The rule provides for a motion within ten days after verdict to set the verdict aside and for judgment on a motion for directed verdict made in the trial, and adds: 'A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative.' An alternative motion for new trial was made in this case. If the judge had refused the judgment on directed verdict for defendant primarily asked, as we have held he should have done, he should then have considered the motion for new trial. According to all the federal cases he has discretion to grant a new trial before another jury if he thinks the verdict is wrong, though there be some evidence to support it, and his action is generally not subject to review on appeal. In this case a new trial might be granted either because the judge thought the jury went wrong in not finding that the fall of the building preceded the fire in the merchandise, or because he thought the amount of the fire loss found was not justified. When we reverse the grant of judgment as on a directed verdict, the cause should be remitted to the district judge that he may pass on the motion for new trial. Cases may occur in which the trial judge may think his charge, or rulings on evidence, or other occurrences in the trial require a new trial. Rule 50 ought not to be so construed as to cut

> off his supervisory power over the verdict because he erred in giving judgment notwithstanding the verdict. To grant a new trial decides no one's rights finally, but only submits them to another jury, with an opportunity to each party to bring forward better evidence if he can, and with opportunity to the judge to correct his own errors if any. New trials are not abridged or disfavored by the new rules. The judge may even grant one on his own initiative without a motion. Rule 59 (d)."

If the decision of the Circuit Court of Appeals is correct in remanding this case with instructions to the District Court to dismiss it without a new trial, then the purpose of Rule 50(b) can be defeated by trial counsel ignoring the plain express provisions of the rule requiring a motion *non obstante veredicto* to be made. By the simple operation of ignoring the necessary requirement of the rule to make such motion, trial counsel, by not complying with the requirements of Rule 50(b) can pass on to the Circuit Courts of Appeal the duties which this rule contemplates the District Judge should perform and thus prolong litigation, increase the burden of the Circuit Courts of Appeal and in effect defeat the purpose of the Rules of Civil Procedure.

It is not believed that this result is either desirable, necessary, or required. We do not believe that it was ever contemplated that trial counsel, by the simple expedient of neglecting to follow the requirements of Rule 50(b), should be permitted to deprive his adversary's client, in this manner, of the right to a new trial in circumstances such as exist here.

In order that the sufficiency of evidence may be reexamined after verdict looking to a judgment notwithstanding a verdict, without new trial, not only must some appropriate means be taken to reserve the point before submission to the jury, but the point must by some appropriate means be submitted to the trial judge after verdict and be by the

trial judge considered or refused consideration. A benefit of this procedure stressed by the authorities is that it gives the trial judge an additional and unhurried opportunity to pass on the point.

Under Federal District Court Rule of Practice 50(b), a motion for directed verdict automatically reserves the point, but does not automatically invoke the action of the trial judge upon the reserved point. This is done by the party against whom the jury has found if he still conceives himself entitled to a judgment notwithstanding the verdict. Since this was not done here, the error before the Circuit Court of Appeals was only error in the course of the trial, upon which retrial only may be ordered.

Assuming, contrary to our contentions, that there was not sufficient evidence to take the case to the jury on the issue of total and permanent disability, we respectfully submit that the judgment of the Circuit Court of Appeals should have been reversal and order for new trial. This, because the only error in the record was one occurring in the course of the trial, viz., the denial of the motion for directed verdict. There was no error by way of refusal to vacate the verdict (and judgment) and enter judgment for respondent, because the District Court does not appear to have refused so to do. By no procedure, formal or informal, was the District Court's consideration directed to the making of such an order as the mandate of the Circuit Court of Appeals now directs that the District Court made.

New Federal Rule 50(b) makes universally possible in Federal practice the substance of the procedure approved in *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, and in the dissenting opinion of Chief Justice Hughes in *Slocum* v. *New York L. Inc. Co.*, 228 U. S. 364, 400. The discussion in the Chief Justice's opinion is more full, and is prophetic of the adoption of a Federal rule. He discusses the manner by which sufficiencies of evidence have been challenged

in common law courts, and the points so raised preserved and disposed of post-verdict with like effect as though determined before submission of cases to juries. He makes plain that whether the means be a "demurrer to the evidence," a motion for a directed verdict, a conditional taking of a verdict with reserved questions of law, a motion for a judgment *non obstante veredicto*, a motion in arrest of judgment, or statutory equivalents or enlargements of these common law conceptions, the substance [illegible] the same. That substance is that the error in the grant or denial of a directed verdict is an error in the course of the trial, redressable only by the vacation of the trial and a new trial, unless means are taken to bring the matter into the record for disposition by the judge after trial.

This is accomplished in all of the illustrations given in this learned opinion by steps in substance as follows: (1) reservation of the point when the case is submitted to the jury, and (2) submission of the point to the judge for decision after the verdict. The means by which these two steps have been accomplished have varied, some of them have been statutory, but without the substance of these two steps an erroneous submission to the jury has not been held, in the precedents collated in this opinion, more than an error in the course of trial calling for a new trial.

What is lacking in the present record is the second of the two steps, which the review of the authorities made in the opinion shows to have been invariably taken to get into the record a ruling (for or against a judgment) on the affirmance or reversal of which, judgment could properly be directed in the Appellate Court. There was no submission to or consideration by the District Court after the verdict of the question whether judgment should despite the verdict be entered for the defendant.

The Federal Rule 50(b) is merely an instrumentality to accomplish the reform which had been local to the States,

notably Pennsylvania and New York, from which these leading cases came.

It provides a means by which the two steps are taken to get into the record on appeal the question whether a final judgment contrary to the verdict and judgment below should be entered. The first step, the reservation of the point or the conditional submission to the jury, is made automatic and implied in the denial of a motion for a directed verdict. The second step is to be taken by the party against whom the ruling was made on the motion for directed verdict. He may move within ten days for a judgment in accordance with his prior motion for a directed verdict. The rule, which so expressly supplies the reservation, does not supply the motion for judgment.

If no motion for judgment is made, then the purposes of this procedure, as explained in *Baltimore & C. Line* v. *Redman*, *supra*, 295 U. S. 654, 660, viz., that it "gave better opportunity for considered rulings," is defeated. There is no unhurried second opportunity for the trial court to rule on the sufficiency of the evidence. It must be the trial court that is referred to, as the appellate court's opportunity for consideration of the sufficiency of the evidence was as good and unhurried before the rule as after, with different consequences, however, if the matter has been brought into the record on review by the grant or denial of a motion after verdict for judgment below.

This Court has held that where the motion in the nature of a motion for judgment *non obstante veredicto* was not made in the District Court, that fact is reason for denying to the Circuit Court of Appeals power on such a record to order judgment contrary to the verdict below. The case is *Aetna Insurance Co.* v. *Kennedy*, 301 U. S. 389, 392, 394, 395. The point appears from the following from this Court's opinion:

"The court refused to direct for plaintiff or defendant and, without reserving for later consideration the requests for directed verdicts or any question of law, submitted the cases to the jury. It found for defendants. Plaintiff filed motions for new trial but did not move for judgments non obstante veredicto. The court denied the motions and entered judgments for defendants."

* * * * * * *

"The applicable Pennsylvania statute provides that whenever, upon the trial of any cause, a point requesting binding instructions has been reserved or declined, the party presenting the point may move the court for judgment non obstante veredicto; whereupon it shall be the duty of the court, if it does not grant a new trial, to enter such judgment as should have been entered upon the evidence. From the judgment thus entered either party may appeal to the supreme or superior court which shall review the action of the court below, and enter such judgment as shall be warranted by the evidence taken in that court. As plaintiff failed to make appropriate motions in accordance with Pennsylvania practice, the district court did not err in failing to give plaintiff judgments notwithstanding the verdicts. The Conformity Act does not extend to the Circuit Court of Appeals. In the absence of motions for judgments notwithstanding the verdict in the lower court, the appellate court was without authority to direct entry of judgments for plaintiff."

The Circuit Court of Appeals in the case at bar supported its disregard of the lack of a motion for judgment in accordance with the denied motion for a directed verdict, and the lack of any consideration or action by the trial court subsequent to verdict, by saying they found nothing in Rule 50(b) to restrict its power to direct entry of judgment.

The court below found nothing in Rule 50(b) that restricts their power to direct the entry of judgment by the

lower court in favor of the defendant rather than to order the granting of a new trial. The court below further states that defendant was *permitted* under Rule 50(b) to file a motion after verdict. The court's position in this regard is believed to be erroneous because as we view the rule the defendant was *required* to file a motion after verdict in order to justify the action taken by the Circuit Court of Appeals here.

The action of the court below is directly contrary to the holding of the decision of this Court in *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364, 57 L. Ed. 879, with which case this Court is familiar. This action in remanding the case with instructions to direct a verdict was grounded (R. 56) upon the following cases:

Conway v. *OBrien* (2 Cir.), 111 F. (2d) 611, 613;
Eastern Livestock Cooperative Marketing Ass'n., Inc., v. *Dickenson* (4 Cir.), 107 F. (2d) 116, 120;
Lowden v. *Denton* (8 Cir.), 110 F. (2d) 274, 278.

The decision of the court below is unsound because it is grounded upon false premises that the above cases supported its decision.

The decision of the Second Circuit in the case of *Conway* v. *O'Brien* is grounded upon the case of *Leader* v. *Apex Hosiery*, 108 F. (2d) 71, and *Massachusetts Protective Association* v. *Mouber* (8 Cir.), 110 F. (2d) 203, in both of which cases motions for verdict *non obstante veredicto* were made. Therefore these decisions are no basis for the action taken by the Second Circuit in the *Conway* case.

The decision of the Circuit Court is based in part upon the *Conway* case. Therefore if the *Conway* case is grounded upon cases which do not support its decision, it follows necessarily that it must fall, and therefore that part of the instant decision of the court below using the *Conway* case as a basis must likewise fall.

In the case of *Eastern Livestock Corp.* v. *Dickenson*, 107 F. (2d) 116, cited by the court below, a motion was made in the trial court to set aside the verdict.

In the case of *Lowden* v. *Denton*, 110 F. (2d) 274, relied upon by the court below, a motion was made to set aside the verdict in that case after judgment in accordance with the motion for directed verdict at the close of the evidence. The record of the Circuit Court of Appeals became the record of the United States Supreme Court and such record was filed in this Court May 17, 1940. See pages 11-13 of that record.

In *Lowden* v. *Denton*, 110 F. (2d) 274, 278 (C. C. A. 8), the Circuit Court of Appeals said:

> "In this instant case, the defendants have meticulously complied with the provisions of this Rule" (50 b) "of court, and hence, on the record now before us and under the circumstances disclosed thereby, are entitled on reversal to have the case remanded with directions to enter judgment for the defendants."

In *Brunet* v. *S. S. Kresge Co.* (C. C. A. 7, decided Nov. 20, 1940), cited by the court below in support of his opinion, a motion *non obstante veredicto* was made.

Also, in *Willis* v. *Pennsylvania Railroad Co.*, 35 Fed. Supp. 941, there was a subsequent motion after verdict.

In the case of *Montgomery Ward* v. *Duncan*, decided December 9, 1940, by this Court, the question here involved was not there presented, that case merely holding that motions for new trial were for the trial courts. This decision has nothing to do with the questions here involved.

In the case of *Demers* v. *Railway Express Agency*, 108 F. (2d) 107, a motion was filed after verdict.

The reasoning of the Circuit Court of Appeals is grounded upon the cases of *Conway* v. *O'Brien*, *supra*, *Eastern Livestock Cooperative Marketing Ass'n, Inc.*, v. *Dickenson*, *supra*, and *Lowden* v. *Denton*, *supra*. These three cases

are clearly distinguished from the situation prevailing in the instant case as just pointed out. Therefore, applying the logic invoked by this Court that "when the root is cut the branches fall" (*Hallowell* v. *Commons*, 239 U. S. 506; *White* v. *United States*, 270 U. S. 175; and *Smallwood* v. *Gallardo*, 275 U. S. 56, 62), so too must the decision of the court below succumb.

The following cases indicate a view contrary to that of the court below:

Ferro Concrete Const. Co. v. *United States*, 112 F. (2d) 288, 492, C. C. A. 1, where the court said:

> "The defendant having moved seasonably that the verdict and judgment thereon be set aside and to have judgment entered in accordance with its motion for a directed verdict, there is no occasion for a new trial of the issues involved in the plaintiff's claim."

In *Reliance Life Ins. Co.* v. *Burgess*, 112 F. (2d) 234, 240, C. C. A. 8, the court said:

> "Plaintiff made a motion for judgment notwithstanding the verdict, which was denied. It follows that the judgment appealed from should be reversed and the cause remanded with directions to enter judgment for the plaintiff. Rule 50, Rules of Civil Procedure; Massachusetts Protective Ass'n *v.* Mouber, 8 Cir., 110 F. (2d) 203; Lowden *v.* Denton, 8 Cir., 110 F. (2d) 274."

Conclusion.

It is respectfully submitted that for the reasons stated herein the judgment of the Circuit Court of Appeals holding that the lower court should have directed a verdict in favor of the United States on the ground that there was not substantial evidence of total and permanent disability should be reversed; and in any event the judgment of the Circuit Court of Appeals remanding this case to the Dis-

trict Court with directions to enter judgment in favor of the United States should be reversed.

Respectfully submitted,

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(7634)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 101

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

PETITIONER'S REPLY BRIEF.

R. K. WISE,
WARREN E. MILLER,
Counsel for Petitioner.

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PETITIONER'S REPLY BRIEF.

This reply brief is directed to the brief filed by the United States in the order in which respondent's arguments were advanced.

Summary of Argument.

I.

RESPONDENT'S MOTION FOR A DIRECTED VERDICT SHOULD NOT HAVE BEEN GRANTED.

(A) There was ample substantial evidence of total disability.

(B) There was ample substantial evidence of permanency.

II.

A. THE CIRCUIT COURT OF APPEALS SHOULD NOT HAVE DIRECTED ENTRY OF JUDGMENT IN FAVOR OF THE UNITED STATES.

B. THE FACT THAT THE RECORD DOES NOT DISCLOSE WHAT MORE EVIDENCE PETITIONER COULD PRODUCE IN A SECOND TRIAL IS NO GROUND FOR REVERSAL.

C. EVEN ASSUMING THAT MOTION FOR JUDGMENT N. O. V. WOULD HAVE ACHIEVED NO DIFFERENT RESULT *in this case*, YET THAT IS NO REASON FOR ASKING THIS COURT TO APPROVE THE ACTION OF THE COURT BELOW AND THUS ESTABLISH THIS VERY DANGEROUS PRECEDENT.

III.

A. THAT PART OF THE DECISION OF THE COURT BELOW WHICH REFERS TO ALLEGED ERROR IN EXCLUDING EVIDENCE WAS *dictum* ONLY AND WAS NOT A PART OF THE COURT'S DECISION.

B. NO PROPER FOUNDATION WAS LAID BY RESPONDENT IN THE TRIAL COURT FOR RAISING A QUESTION AS TO THE ACTION OF THAT COURT IN EXCLUDING THIS EVIDENCE; AND RESPONDENT WAIVED ANY RIGHT THAT MIGHT HAVE EXISTED IN THIS RESPECT.

ARGUMENT

I.

Respondent's motion for a directed verdict should not have been granted.

(A) There was ample substantial evidence of total disability.

Total disability is defined by regulation (T. D. 20 W. R.) as any impairment of mind or body which renders it impos-

sible for the disabled person to follow continuously any substantially gainful occupation. The record here does not disclose that this insured, after April 2, 1919, the date the jury determined that he was totally and permanently disabled, ever did work regularly or continuously at any substantially gainful occupation.

A medical witness, who came in contact with the insured in 1919, and saw him from time to time until 1935, testified (R. 22-23):

> "* * * I would say his mental condition would keep him from working. He is not able to judge the necessity of the thing to be done about his business. I would not have advised him to do any work since he has been out of the Army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically. He is not physically in good shape, and is mentally in bad shape. When he got out of the Army I didn't hold any hope for his recovery, a man in his condition will go from bad to worse."

From the foregoing, it is clear that work would have been harmful to the insured. One who has a serious and incurable ailment, for which rest is the recognized treatment and which will be aggravated by work of any kind, is nevertheless totally and permanently disabled, although he may for a time engage in gainful employment. One so incapacitated may only work at the risk of injury to his health and danger to his life. *Lumbra* v. *United States*, 290 U. S. 551, 54 S. Ct. 272, 78 L. Ed. 492; *Nicolay* v. *United States* (C. C. A. 10) 51 F. (2d) 170, 173; *United States* v. *Phillips*, (C. C. A. 8) 44 F. (2d) 689, 691; *Carter* v. *United States* (C. C. A. 4) 49 F. (2d) 221, 223; *United States* v. *Lawson* (C. C. A. 9) 50 F. (2d) 646, 651; *United States* v. *Barleyson*, (C. C. A. 9) 64 F. (2d) 868, 872; *United States* v. *Sorrow* (C. C. A. 5) 67 F. (2d) 372.

In *United States* v. *Sorrow*, *supra*, the court said:

> "One is totally disabled when he is not, without injury to his health, able to make his living by work."

It is not even necessary that the disease be classified. *United States* v. *Tyrakowski*, 50 Fed. (2d) 766, 7th C. C. A.

Respondent in its brief at page 9 asserts that the insured failed to take hospital treatment or other medical treatment for his mental condition after the expiration of insured's protection. The insured did go to hospitals when respondent sent him there, and the jury, from their own experience in life, undoubtedly knew that usually it is not until a mentally ill person becomes dangerous to himself and others that he is incarcerated in an insane asylum.

Dr. Land testified (R. 24):

> "He was not at all violent and I considered that if he could have somebody transact his little business for him, that since he was not violent it would not be necessary to commit him to an insane asylum."

Respondent, on page 20 of its brief, infers that the insured farmed regularly until about five years prior to trial. This inference is based upon a statement signed by the witness, J. M. Broyles, which was written (R. 14) by a representative of the government, who did not write down everything the witness told him (R. 13). To adopt respondent's contention about the insured's working, clearly would not be giving the evidence the inferences to which plaintiff is entitled under the circumstances. This witness further testified (R. 13): "He was never normal from the first time I knew him"; and (R. 11): "From the time he moved there through December 1935, what time I was with him and had occasion to see him he seemed to be all unbalanced, both mentally and physically and I told a Government man this several years ago. I didn't see how a man could work and

get along in the physical condition he was in. * * * I can't tell his own feelings, but from the way he acts is all I have to go by. I would not have hired him as a Farm hand at any time since 1925. I wouldn't want such labor as he would give me."

It was for the jury and not the Circuit Court of Appeals to pass upon the weight to be given all the testimony of all the witnesses. Considering this testimony as a whole, it clearly shows that the insured was totally and permanently disabled from working ever since the insured returned from the Army.

The respondent's own records show that while still in the Army in 1918, the insured was *nervous* (R. 28) and gave the impression to the government's examining physician of having neurasthenia. During the examination made of the insured by respondent's physician November 24, 1925 (R. 19) the insured appeared very *nervous*, and it was difficult for him to be still. This doctor's diagnosis then was psychoneurosis, *neurasthenic type*. On April 11, 1935, (R. 21) the last examination of record prior to the appointment of a committee for the insured (which occurred on December 9, 1935) a diagnosis of *neurasthenia* was made. At that time the respondent's physician who made the examination stated that no change was found in the insured's condition since his last examination. The examination prior to that was for the period September 13, 1933 to November 23, 1933.

This same diagnosis of neurasthenia was given to the insured prior to his discharge from the Army while he was in France in 1918; again in 1925; and again in 1935, by respondent's physicians. The last examination made of the insured prior to the appointment of a committee in 1935 showed this diagnosis, and from the standpoint of this diagnosis the jury could well have believed that while he was still in the service his condition then warranted the appoint-

ment of a committee; and that this was a permanent disability, this diagnosis having been made at different times over a period of years.

Further, report of February 14, 1921, shows (R. 18) hypochondriasis. Dr. Land testified (R. 25) that hypochondriasis and psychoneurosis were practically the same thing.

The reports of November 24, 1925 (R. 19) and April 11, 1935 (R. 22) show the same neurasthenic condition as explained by Dr. Land, who testified to facts of which he had personal knowledge and which he related to the jury, and showed conclusively that this insured had been unable to work. The jury, considering this evidence, pieced together the whole picture and then after considering all inferences fairly deducible from it properly returned a verdict for the plaintiff. This verdict should not be disturbed by the Circuit Court of Appeals, sitting many miles away from the scene of trial and with no opportunity to personally observe the witnesses.

In determining whether there was any evidence to sustain a verdict for the petitioner all facts that the evidence supporting his claim reasonably tends to prove should be assumed as established and all inferences fairly deducible from them should be drawn in his favor. *Lumbra* v. *U. S.*, *supra*.

B. There was ample substantial evidence of permanent disability.

The permanency of the insured's disability as shown by the evidence referred to herein clearly brings this case within the rule of law that as permanency of any condition (here total disability) involves the element of time, the continuance of disability during the passage of time is competent and cogent evidence. *McGovern* v. *United States*, 249 Fed. 108, cert. denied 267 U. S. 608.

We have here the opportunity to observe the effect the passage of time has had upon this insured's disability. His condition has not improved during these twenty years, but on the contrary, he has become worse physically and mentally. We respectfully submit that it is reasonable to presume that in view of the continuation of this disability over all these twenty-odd years it will continue the remainder of the insured's life. It is not believed that any more time is required in order to establish the permanency of this condition. However, if any time in the future the insured should recover the ability to follow continuously any substantially gainful occupation, then under the express terms of T. D. 20 W. R., which is still in full force and effect, the respondent here can cease making payments. T. D. 20 W. R. provides that in the event of the recovery of the insured from total and permanent disability, respondent discontinues benefits. Indeed the statute itself so provides.

II.

A. The Circuit Court of Appeals should not have directed entry of judgment in favor of the United States.

The particular question of interpretation of Rule 50 (b) of the Rules of Civil Procedure is whether the provision in the rule for a motion for a judgment, notwithstanding the verdict, is merely permissive or is mandatory. Clearly, the Court of Appeals may not grant a judgment, notwithstanding the verdict, unless the trial court could have done so. Thus, the question is whether the trial court was in a position to grant judgment, notwithstanding the verdict, and could have done so in the absence of a motion made in the trial court as provided in the rules for judgment, notwithstanding the verdict.

It is unfortunate that the rule contains any ambiguity and that it did not expressly provide that, in order to obtain

judgment, notwithstanding the verdict, the motion must be made. It seems clear, however, that notwithstanding there is no express provision in the rule requiring that the motion be made in order to entitle the defendant either in the trial court or on appeal to have judgment entered, notwithstanding the verdict, the necessary implication is that the motion must be made and that, failing to make it, all that the lower court may do is to grant a new trial, and all that the appellate court may do, if it is of the opinion that there was no evidence to go to the jury, is to grant a new trial.

To understand the rule, one must examine the background under which it was drawn. In *Slocum* v. *New York Life Insurance Co.*, 288 U. S. 364, and *Baltimore & Carolina Line* v. *Redman*, 295 U. S. 654, this Court considered the question of whether an appellate court could grant judgment, notwithstanding the verdict, without depriving a party of his constitutional right to a jury trial. The net result of these decisions at the time the Federal Rules of Civil Procedure were drawn was that if the trial court, on motion for an instructed verdict at the close of the testimony, reserved the question of law for a later consideration and submitted the case to the jury subject to a later determination by the court of that question of law, the trial court, and also the Court of Appeals, could grant judgment, notwithstanding the verdict, without an unconstitutional deprivation of the right to a jury trial. Rule 50(b) might have been drawn so as to provide that if the trial court reserved the question of law and submitted the case to the jury subject to a later determination as to whether there was sufficient evidence to go to the jury, the trial court, and in its turn the appellate court, could in a proper case order judgment, notwithstanding the verdict. If the rule had been drawn that way, the result would have been in many cases that the lower court might have denied a motion for a directed verdict, without making any reservation of the right to later determine the suffi-

ciency of the evidence to go to the jury, with the result under the decision in the *Redman* case that the Court of Appeals would have been in no position to direct judgment, notwithstanding the verdict. It seemed better, therefore, to provide, as the rule does, that in denying a motion for a directed verdict the trial court will be "deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion", whether the trial court said so or not.

The result is that under Federal Rule 50 (b), regardless of whether the trial court says it is doing so, there is a reservation for future determination of the question raised by the motion to direct. In every case, therefore, where a motion for directed verdict is not granted, under Rule 50 (b) the situation is precisely the same as if the trial court said, "I think I will submit this case to the jury and take its verdict and reserve for later determination the question whether the motion for a directed verdict should be granted." The result is that the trial court automatically makes no decision on the motion to direct, where it is not granted. He makes no decision on the motion to direct, unless it is brought up before him in a proper way after the verdict by motion for judgment, notwithstanding the verdict.

Where, therefore, a motion for a directed verdict is made and not granted, and an appeal is taken from the judgment against the moving party, without there having been first a motion, notwithstanding the verdict, before the trial court, the trial court has not committed any error in failing to grant the motion for a directed verdict, because he has made no decision on the point but reserved it for future determination and that future ruling by the trial court has never been made because he has not been asked to make it by a motion provided for in the rules for a judgment, notwithstanding the verdict.

It seems clear, therefore, that by virtue of the provision in Rule 50(b) to the effect that a trial court shall always be deemed to have reserved decision on the question, it necessarily follows that, in order to force him to a decision, the motion for judgment, notwithstanding the verdict, must be made, even though the rule does not expressly say it is mandatory, and we see no theory on which the appellate court can order judgment, notwithstanding the verdict, if the trial court has never made a ruling on the point. The fair implication of the rule is, therefore, that the party who has moved for an instructed verdict which was not ordered, waives this point and waives that motion if he does not follow it up by asking a ruling of the trial court in the form of a motion for judgment, notwithstanding the verdict.

The court below in its opinion states (R. 56-57):

> "We do not by this rule make it necessary for the trial court even to say, 'I am reserving the question of law.' That is a form anyway, and we make it safe in all cases by the device of prescribing that wherever he refuses to grant a motion for directed verdict he is deemed to reserve the question of law, taking the verdict subject to his later determination, and consequently may on motion afterwards set aside the verdict, grant judgment notwithstanding, and the circuit court of appeals may take the same action."

That statement which Mr. Mitchell made says that the *trial court* "may on motion afterwards set aside the verdict, grant judgment notwithstanding, and the circuit court of appeals may take the same action." The court below apparently thought this statement was intended to assert that the circuit court of appeals may order judgment, notwithstanding the verdict, regardless of whether a motion to that effect was made in the trial court. Obviously Mr. Mitchell had no intention of making any such statement,

and we do not think the recorded statement is susceptible of that interpretation. When he said that the circuit court of appeals may take the same action, he meant that, if a motion was made in the trial court for judgment, notwithstanding the verdict, and that motion was denied, the circuit court of appeals could nevertheless order judgment, notwithstanding the verdict. Mr. Mitchell's quoted statement says that the trial court may "on motion" grant judgment, notwithstanding the verdict, and the statement that the circuit court of appeals "may take the same action" *necessarily* means it may do so if a motion to that effect has been made in the trial court because one does not make motions in an appellate court for judgment, notwithstanding the verdict. Apparently the court below overlooked this fact. Mr. Mitchell did not state that the circuit court of appeals could order judgment, notwithstanding the verdict, if no motion to that effect had been made in the trial court, and we believe it will be obvious to this Court upon careful consideration of the matter that the court below misconstrued the intent of Mr. Mitchell in the language quoted in its decision.

B. The fact that the record does not disclose the evidence petitioner could produce in a second trial is no ground for reversal.

Respondent in its brief (p. 9) asserts there is nothing in the record to suggest that petitioner's case would be altered in any material respect if a new trial were granted. There was sufficient evidence produced to persuade the jury in holding the insured to have been permanently and totally disabled; and to persuade the trial court that the case should have been submitted to the jury. Because there was insufficient evidence submitted to persuade the circuit court of appeals that the insured was totally and perma-

nently disabled, respondent urges this as ground for reversal.

In the course of a trial, the trial attorney does not take up unnecessarily the time of the court in producing cumulative testimony. The trial attorney when it appears that sufficient evidence is introduced, there is no reason for taking the time of the court and going to the expense of adducing additional evidence.

If this Court should hold that there is any defect in the *quantam* of the testimony introduced here, upon a new trial the petitioner can supply the requisite defects.

He should be given that right, and he is entitled to a new trial unless this Court has overruled its previous decision in the *Slocum* case, *supra*. In the *Redman* case, this Court distinguished the *Slocum* case and did not contend that the previous decision in the *Slocum* case was overruled.

C. Even assuming that motion for judgment N. O. V. would have achieved no different result in this case, yet that is no reason for asking this Court to approve the action of the court below and thus establish this very dangerous precedent.

The mere fact that the trial court in this case *might* have denied defendant's motion for judgment *non obstante veredicto* is no reason for the rule to be construed as it was done by the circuit court of appeals. In another case, the trial judge *might* think differently if the required motion had been made. Clearly, the fact (if it be a fact—which is not conceded) that this trial judge *might* have overruled the motion *non obstante veredicto*, did not authorize or license the circuit court of appeals to direct entry of judgment in favor of the United States.

The rule *requires* that a motion *non obstante veredicto* be made, and it is respectfully submitted that this requirement is not satisfied merely because the trial court *in this*

case might have been in a state of mind to deny it if it had been made. That is purely conjecture, and is no proper basis for this Court to use in basing so important and vital a decision with respect to this rule.

The circuit court of appeals should not be permitted to do that which the trial court itself had no opportunity to do.

III.

A. That part of the decision of the court below which refers to alleged error in excluding evidence was *dictum* only and was not a part of the court's decision.

The court below in its opinion stated:

> "Although it no longer becomes necessary for the purposes of this opinion to consider the correctness of the District Judge's rulings on the evidence, we do feel that one of these rulings was of such importance as to merit our present consideration." * * *

A reading of that part of the court's opinion referring to the exclusion of evidence and the instruction of the trial court shows clearly that this portion of the court's opinion is nothing but *dictum*. The court below obviously did not base its decision upon this point, but merely mentioned it in passing. This point was not raised in connection with the granting of this writ and is not properly for consideration by this Court upon the issues here presented.

Clearly petitioner was as much damaged as respondent by this ruling of the court, and even though the ruling might be considered erroneous, it was not prejudicial but harmless. Further, petitioner attempted to offer evidence (R. 22) examination reports dated December 18, 1935, and June 30, 1936, contained in plaintiff's Exhibit No. 1. However, these examination reports were objected to by *this respondent* and by reason of such objection, were excluded by the court.

We submit, therefore, that this Court should not consider this point, because the result of the court's rulings upon the admission of evidence was as fair for one side as it was for the other. To now permit this respondent to use as a basis for reversing this case the action of the trial court in excluding evidence over a certain period of time, when this respondent, by counsel, objected to similar evidence, would not be in keeping with substantial justice.

B. No proper foundation was laid by respondent in the trial court for raising a question as to the action of that court in excluding this evidence; and respondent waived any right that might have existed in this respect.

In any event, respondent has waived the right to claim error with reference to this evidence by failing to give any offer of proof of the insured's condition after he was adjudicated insane. As we read the record, we find no indication that defendant had testimony available to this effect.

Rule 43 (c) of the Rules of Civil Procedure[1] requires the examining attorney to make a specific offer of what he expects to prove by the answer of the witness. No such offer was made by counsel for respondent in this case. The general rule unquestionably is that a party may not predicate error upon the exclusion of evidence unless there has

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[1] Rule 43(c) of the Rules of Civil Procedure provides:

"*Record of Excluded Evidence.* In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

been at the trial, "an offer of relevant proof specific, not so broad as to embrace irrelevant and immaterial matter and made in good faith". *Central Pacific Ry. Co.* v. *California*, 162 U. S. 91 at 117, 16 S. Ct. 766, 40 L. Ed. 903 at 912.

Because no offer of proof was made by appellant with respect to any evidence it desired to offer covering the period after the insured was adjudicated incompetent by the county court, the record here, as in the case of *Ricketts* v. *United States*, 32 F. (2d) 943, 59 App. D. C. 47, makes it impossible to determine whether the questions appellant would have asked and the answers to said questions were relevant and material and, if so, whether their exclusion was prejudicial to the defendant's cause.

In this case, as in the case of *United States* v. *Witbeck*, 113 F. (2d) 185 (at page 187) the record now before this Honorable Court discloses no error, and accordingly it must be assumed there was none.

Conclusion.

For the reasons stated above, it is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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FILE COPY

No. 101

In the Supreme Court of the United States

OCTOBER TERM, 1941

JAMES H. HALLIDAY, A PERSON NON COMPOS MENTIS, BY HIS COMMITTEE, ANNIE HALLIDAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH [redacted] Circuit

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the District Court in overruling the motion for a new trial (R. 74–76) is not reported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 87–96) is reported in 116 F. (2d) 812.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1941 (R. 97). A petition for rehearing was filed February 7, 1941

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(R. 98–105), and denied March 10, 1941 (R. 106). The petition for a writ of certiorari was filed May 22, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether there was substantial evidence to establish that petitioner became totally permanently disabled while his contract of yearly renewable term insurance was in force.

2. If not, whether the Circuit Court of Appeals under Rule 50 (b) of the Rules of Civil Procedure had power to direct the entry of judgment for the United States where there was no motion for judgment notwithstanding the verdict, but the District Court is shown to have considered whether there was substantial evidence to support the verdict not only upon the Government's motion for a directed verdict but also upon its motion for a new trial.[1]

PERTINENT STATUTE, REGULATIONS, AND RULE

Pursuant to statute (War Risk Insurance Act of October 6, 1917, c. 105, Sec. 402, 40 Stat. 409)

[1] A question reserved for argument if certiorari should be granted is whether the District Court committed reversible error in ruling that evidence would not be admitted as to the condition of petitioner subsequent to the date on which a county probate court adjudged him to be of unsound mind and in instructing the jury that he was to be regarded as totally permanently disabled from that date.

and regulation (Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Vol. II, pp. 1233–1237) the contract sued upon provided for payment to the insured of monthly benefits at the rate of $5.75 for each $1,000 of insurance in the event he became totally and permanently disabled while the insurance was in force.

Total permanent disability was defined by regulation (Treasury Decision No. 20, Regulations & Procedure, United States Veterans' Bureau, Vol. I, p. 9), pursuant to statutory authorization (Sec. 402, War Risk Insurance Act, *supra*), as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Rule 50 (b) of the Rules of Civil Procedure for the District Courts of the United States[2] provides:

> Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the

[2] Hereinafter called the Federal Civil Procedure Rules.

jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT

On November 20, 1936, petitioner, having been adjudged by a county probate court as mentally incompetent on December 9, 1935 (R. 7, 12–16), brought suit by his committee in the United States District Court for the Western District of South Carolina to recover benefits under a $10,000 contract of war risk term insurance. He alleged in his complaint that he was totally permanently disabled on April 2, 1919, the date

of his discharge from the military service (R. 2–5). The contract, which lapsed on that date, was reinstated on August 1, 1920, and remained in force until October 31, 1920 (R. 18, 88). Accordingly, the issue submitted to the jury was whether petitioner was totally permanently disabled on or before the latter date (R. 66–67).

The Government moved for a directed verdict at the close of the evidence on the ground, among others, that there was no substantial evidence that the petitioner was totally permanently disabled while his insurance was in force. The motion was denied (R. 59–60). The jury rendered a verdict for petitioner, finding that he became totally permanently disabled on April 2, 1919 (R. 72). The Government made a motion for a new trial (not contained in the record), which was overruled in an opinion disclosing, *inter alia*, that, in accordance with its ruling on the Government's motion for a directed verdict, the District Court was of the opinion that "there was ample evidence to go to the jury" (R. 74). No motion for a judgment notwithstanding the verdict was made. Judgment for petitioner was entered on the verdict (R. 77–79) and the Government appealed (R. 79). The Circuit Court of Appeals held that there was no substantial evidence that petitioner was totally permanently disabled while his insurance was in force (R. 88–89) and reversed and remanded with directions to enter judgment for the Government (R. 97).

The Circuit Court of Appeals relied on the provision in Rule 50 (b), *supra*, for the automatic reservation of the legal questions raised by a motion for directed verdict, as establishing its power to direct the entry of judgment for the Government. The court also held that the Government's failure to make a motion for judgment notwithstanding the verdict, as permitted by the Rule, did not prevent it from exercising that power, although "it would have been the course of wisdom" for the Government to have made such a motion. The exercise of the power to direct the entry of judgment, rather than the granting of a new trial, was, the Circuit Court of Appeals indicated, warranted in the instant case in the interest of "the orderly administration of justice" (R. 94–96).

The Circuit Court of Appeals expressed the view, *obiter*, that the District Court had erred in ruling that no evidence would be admitted as to petitioner's condition subsequent to December 9, 1935, the date on which the county probate court had adjudged him to be mentally incompetent. The Circuit Court of Appeals was of the opinion that this adjudication, which was made in an informal and *ex parte* proceeding, was only prima facie evidence of insanity as against one not a party to the proceeding, and, in any event, was not conclusive evidence of total permanent disability (R. 93–94).

ARGUMENT

I

In contending that the Circuit Court of Appeals erred in holding that the District Court should have directed a verdict for the Government, petitioner does not rely upon any physical disorder but solely upon a mental condition (Br. 12–20).[2] We submit that there was no substantial evidence showing the existence prior to the expiration of insurance protection on October 31, 1920, of any mental disorder rendering petitioner totally permanently disabled.

Although petitioner was hospitalized for six months of his service in the Army for slightly more than nine months (June 23, 1918, to April 2, 1919, R. 2), the hospital records carry no notation that he was suffering from any mental disorder which might be considered disabling, nor was any such notation made when petitioner was examined by a physician at the time of his discharge (R. 44–49). The first two hospital records, made

[2] The record indicates that upon his return from service petitioner was physically handicapped so far as any strenuous farm work was concerned, primarily because of arrested tuberculosis and hyperacidity of the stomach (R. 8, 28, 29, 34, 40–41, 98). However, immediately before he went into the Army petitioner had successfully carried on as a clerk in a drygoods store at a salary of $150 a month (R. 25, 43). There was no evidence that his physical condition would have prevented him from engaging in some activity of this type or in some occupation involving less physical exertion than farming.

shortly after petitioner had suffered a back injury, merely stated that he was "very nervous," that he "looks nervous, but not particularly sick," and that he "gives impression of neurasthenia" (R. 45–46).

To cover the period between petitioner's return to his home from the Army in April 1919, and the termination of insurance protection on October 31, 1920, petitioner relied upon the testimony of a Doctor Land, as well as lay testimony given by two of his brothers, his wife and two friends or acquaintances who had known him prior to his military service.[4]

With reference to the crucial period, one brother testified merely that petitioner when he returned from the Army was nervous (R. 28), and another simply that he was very badly torn up mentally, was a mental wreck, and inclined to talk continually about the War (R. 43). A friend stated only that petitioner was a changed man and was indifferent or argumentative to former friends (R. 25), and an acquaintance merely that he was nervous and did not have the best control of himself (R. 26–27). Obviously this testimony was too generalized to be of any evidential value in respect of the issue of total permanent disability.

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[4] Another lay witness did not become acquainted with petitioner until 1925 (R. 20), and still another testified only as to petitioner's mental and nervous condition from about 1927 (R. 23–24).

The testimony of the wife, so far as it is relevant to the pertinent period, is equally indefinite and not indicative of any disabling mental condition. She testified that at the time of their marriage on April 16, 1921, over five months after petitioner's insurance lapsed, petitioner was suspicious of everybody and that this had been true since his discharge from the service (R. 8). But that the wife did not then or for a considerable time think that the petitioner was mentally disabled is evident from the facts that she permitted him to court her over a period of several years, that she married him and bore him four children, that three years after their marriage they rented one farm of 50 acres and several years later bought another farm of 75 acres (R. 10–11), and that she took no steps to have petitioner adjudged mentally incompetent or to have herself appointed as his committee until December 9, 1935 (R. 12). Even then petitioner's confinement in a mental hospital was not deemed necessary and the adjudication was sought solely to permit someone to transact for the petitioner whatever business he had (R. 39).[5]

[5] The only specific instances of mental abnormality to which petitioner's wife testified—threats of suicide, threats to kill her and the children, fear of poisoning (R. 8), as to none of which was a definite or even approximate date given—evidently occurred long after the period of insurance protection. As to petitioner's threats regarding his wife and children, cf. R. 10.

Moreover, it appears from her testimony that at the time of their marriage in April 1921, petitioner was taking a vocational training course in agriculture at Waynesville, North Carolina, and that he continued in his vocational training there and at Athens, Georgia, until 1924, a period of over three years (R. 7, 10). While petitioner's wife testified that "He did not go to school every day" (R. 10), no light was attempted to be shed on petitioner's mental condition while he was taking vocational training through the introduction of the vocational training records.

The only medical evidence introduced by petitioner which, we believe, had any real evidential value, so far as his mental condition is concerned, is petitioner's Exhibit No. 1, consisting of some 18 reports of examinations of petitioner by Government medical examiners and at Government hospitals covering the period from April 12, 1920, to April 11, 1935, and apparently made for purposes of compensation and vocational training (R. 29–34).[6] The two reports made during the period of insurance protection make no mention of any mental or nervous condition (R. 29). The third, rendered on February 14, 1921, three and one-half months after petition-

[6] Several later reports were excluded by the District Court because of its ruling as to the conclusiveness on the issue of total permanent disability of petitioner's adjudication as a mental incompetent by the county probate court on December 9, 1935 (R. 35; see also R. 12–19).

er's insurance lapsed, has merely a notation of "hypochondriasis" (R. 29).[7] The next eight, embracing the period from February 16, 1921, to December 17, 1924, carry no notation of any mental or nervous condition (R. 30). Indeed, the report of December 17, 1924, the first of the reports which mentions any mental or neuropsychiatric examination as such, states that "There is no history or evidence of any psychosis" and that "There is no N. P. [neuropsychiatric] Disability." The remaining 7 reports, commencing with November 24, 1925, refer to psychoneurosis and psychosis, neurasthenic type, and neurasthenia, but practically all of them note that it was of moderate degree. It is obvious that these reports were of no aid to the petitioner in establishing that he was totally permanently disabled from a mental disorder before his insurance expired in October 1920, and, indeed, in our opinion, tended to refute his claim.

Petitioner produced but one medical witness, Dr. Land. He testified that he had known petitioner since he was "a little tot"; that he was a bright boy when he went into the Army; that when he was discharged from the service he had a mental condition which, the doctor thought, was psychoneurosis, "In other words, he was rather much of a

[7] This term is defined in the American Medical Dictionary (Dorland) as follows: "Hypochondriasis: Morbid anxiety about the health, often associated with a simulated disease and more or less pronounced melancholia."

hypochondriac"; and that psychoneurosis was a mental condition which makes a man think he has everything the matter with him. The doctor also stated that he would not have advised petitioner to do any work since he has been out of the Army, as work would have resulted in a complete collapse mentally and physically; that he did not hold any hope for petitioner's recovery, apparently from his mental condition, when he got out of the Army because a man in his condition would go from bad to worse; and that his condition, the doctor thought, had gradually progressed (R. 35–36). But, we submit, when this testimony is appraised in the light of the doctor's other testimony, it had little, if any, probative value and certainly did not rise to the degree of substantial evidence on the decisive question as to whether, mentally, petitioner was totally permanently disabled before insurance protection terminated in October 1920. Thus, it appears from the doctor's testimony that he was a general practitioner and not an expert on mental disorders (R. 38); that he had been petitioner's physician only since about 1932 or 1933 (R. 37, 40); that when he first examined petitioner at that time, petitioner had a real and not a fancied ailment (hyperacidity of the stomach), for which the doctor prescribed (R. 41), that his contacts with petitioner prior to 1932 consisted merely of seeing and talking with petitioner on the street several times a year (R. 38, 40); that he could not say definitely whether he had seen petitioner while petitioner was

taking vocational training in Waynesville and Athens (R. 38); and that when he did see petitioner he had "simply shunted him off and got away from him as best I could" (R. 41).

Moreover, the record is barren of evidence that petitioner was treated for any mental condition.[5] He could have been treated at Government expense but, according to the testimony of his wife, resented going to a hospital for mental diseases (R. 11–12). Consequently, the record leaves wholly in the realm of speculation the crucial question as to whether, if it be assumed that petitioner had a totally disabling mental disorder prior to the expiration of insurance protection, such disorder was then permanent in character, not subject to cure or alleviation by treatment. It is well recognized in war-risk insurance cases that a verdict may not rest upon such a conjectural basis and that where, as here, there is a failure to take treatment for a condition not shown to be incurable, the mere continuance of total disability does not constitute substantial evidence that it was permanent from its inception. *Falbo* v. *United States*, 64 F. (2d) 948 (C. C. A. 9th), affirmed *per curiam*, 291 U. S. 646; *Theberge* v. *United States*, 87

[5] While petitioner had numerous contacts with Government examiners and Government hospitals, as is apparent from his Exhibit No. 1 (*supra*, p. 8), these contacts were evidently for the purpose of observation and diagnosis in connection with vocational training and compensation, and not for treatment.

F. (2d) 697, 699 (C. C. A. 2d); *United States* v. *Rentfrow*, 60 F. (2d) 488, 489 (C. C. A. 10th); *United States* v. *Hill*, 62 F. (2d) 1022, 1025 (C. C. A. 8th); *Walters* v. *United States*, 63 F. (2d) 299, 301 (C. C. A. 5th). Such holdings do not in any sense penalize an insured, as petitioner seems to suggest (Br. 14–15), but rest upon the contract provision which makes permanence of total disability a condition to maturity of the insurance. Hence the doctrine is just as applicable to a case of mental disability as to any other type of case. See *United States* v. *Kiles*, 70 F. (2d) 880 (C. C. A. 8th).

II

If the Circuit Court of Appeals was correct in holding that there was no substantial evidence that petitioner was totally permanently disabled when his insurance expired in October 1920, the question then arises as to whether that court had the power to direct judgment to be entered for the Government in lieu of granting a new trial.[9]

[9] If the court had such power, we believe it is clear that it was properly exercised in the interest of "the orderly administration of justice." Petitioner makes no contention to the contrary and obviously there is no ground for a new trial by reason of any ruling prejudicial to petitioner or any reason to assume that petitioner could make a better case upon another trial. Indeed, the nature of the deficiencies in his proof heretofore discussed indicates that he could not.

(a) This question involves the construction of Rule 50 (b) of the Federal Civil Procedure Rules. This Court in *Berry* v. *United States*, No. 336, October Term, 1940, and *Conway* v. *O'Brien*, No. 344, October Term, 1940, granted writs of certorari to resolve a similar question, but found it unnecessary to do so because of its conclusion in each case that there was substantial evidence warranting submission of the case to the jury. While we do not believe that the present case is subject to the same disposition, the question raised in the *Berry* and *Conway* cases is, we believe, different from the question here presented for the reason that in neither of those cases was there a post-verdict consideration by the District Court of the question raised by the motion for a directed verdict. In the instant case, however, while the Government did not make a motion specifically requesting a judgment notwithstanding the verdict, it did, as is apparent from the District Court's opinion, invoke consideration of the question raised by its motion for a directed verdict by filing a motion for a new trial, and the court specifically passed upon that question when, in denying the motion for a new trial, it held that "there was ample evidence to go to the jury" (R. 74). This, we believe, resulted in substantial compliance with the design and purpose of the provision of Rule 50 (b) for the filing of a motion for judgment notwithstanding the verdict, if such a motion be

deemed a condition precedent to the exercise of power by a Circuit Court of Appeals to direct judgment. The mere fact that the Government in the instant case did not specifically ask for a judgment notwithstanding the verdict would seem to be of no consequence. Cf. Rule 54 (c).[10]

(b) If, however, the case may be regarded as presenting the point upon which this Court granted writs of certiorari in the *Berry* and *Conway* cases, the decision of that point by this Court may nevertheless now be deemed unnecessary.

The point is not likely to arise in the future. It has arisen in the past only in cases, such as the present case and the *Berry* and *Conway* cases, which were tried relatively soon after the effective date of the new Rules and during the period of lack of familiarity on the part of the Bar with

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[10] That Rule provides: "(c) DEMAND FOR JUDGMENT. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

the new procedures prescribed by Rule 50 (b). The lapse of time has afforded an opportunity for counsel to become familiar with the procedural changes embodied in Rule 50 (b) and the opinions of this Court in the *Berry* and *Conway* cases have focused the attention of the Bar upon the advisability of specific compliance with the provisions of the Rule.[11]

CONCLUSION

It is respectfully submitted that the case involves no question requiring review by this Court on writ of certiorari and that the petition should therefore be denied. However, if the petition is granted, we submit that review should be limited to the procedural point arising under Rule 50 (b), since the decision of the Circuit Court of Appeals as to the legal sufficiency of the evidence is correct and the principles of law involved in respect

[11] Of course, if this Court should decide to review the point, the Government will urge the correctness of the decision of the Circuit Court of Appeals. See the Government's brief in the *Berry* case.

thereto have been sufficiently elucidated by the prior decisions of this Court.[12]

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JULY 1941.

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[12] If certiorari is granted the Government will urge (as grounds for supporting the reversal by the Circuit Court of Appeals of the judgment for petitioner) that the District Court erred in ruling that no evidence would be admitted as to petitioner's condition subsequent to the adjudication by the county probate court that he was mentally incompetent (R. 12–19) and in instructing the jury (R. 68–69, 71) that, as a matter of law, the petitioner was to be regarded as totally permanently disabled from the date of that adjudication.

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The opinion of the District Court in overruling the motion for a new trial (R. 44–45) is not reported. The opinion of the United States Circuit Court of Appeals for the Fourth Circuit (R. 51–58) is reported in 116 F. (2d) 812.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 9, 1941 (R. 58). A petition for rehearing was denied March 10, 1941 (R. 64).

The petition for a writ of certiorari was filed May 22, 1941, and was granted October 13, 1941 (R. 66). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals correctly held that there was no substantial evidence that petitioner was totally permanently disabled while his contract of war risk insurance was in force.

2. If so, whether the Circuit Court of Appeals had power to direct the entry of judgment for the United States and properly exercised that power where no motion was made in the District Court for judgment notwithstanding the verdict, as permitted by Rule 50 (b) of the Federal Rules of Civil Procedure, but the District Court did give post-verdict consideration to the question presented by the Government's motion for a directed verdict in ruling on a motion for a new trial.

3. Whether, in any event, the District Court committed reversible error in ruling that evidence would not be admitted as to the condition of petitioner subsequent to the date (after the insurance expired) on which a county probate court adjudged him to be incompetent, and in instructing the jury that he was to be regarded as totally permanently disabled from that date.

tract of war-risk term insurance. He alleged in his complaint that he was totally permanently disabled on April 2, 1919, the date of his discharge from the military service (R. 1–3). The contract thereafter lapsed but was reinstated on August 1, 1920, and remained in force until October 31, 1920 (R. 10, 51). Accordingly, the issue submitted to the jury was whether petitioner was totally permanently disabled on or before the latter date (R. 41–42, 51).

The Government moved for a directed verdict at the close of the evidence on the ground, among others, that there was no substantial evidence that petitioner was totally permanently disabled while his insurance was in force. The motion was denied (R. 36). The jury returned a verdict for petitioner, finding that he became totally permanently disabled on April 2, 1919 (R 43). The Government made a motion for a new trial (not contained in the record), which was overruled in an opinion disclosing that the sole questions considered by the District Court in so ruling were whether petitioner had made out a case for the jury and, if so, whether there was such a preponderance of evidence in favor of the Government as to require the granting of a new trial (R. 44–45). No other post-verdict motion was made. Judgment for petitioner was entered on the verdict (R. 45–46) and the Government appealed (R. 47). The Circuit Court of Appeals held that there was no substantial evidence that petitioner was

totally permanently disabled while his insurance was in force (R. 51–55) and reversed and remanded with direction to enter judgment for the Government (R. 58).

The Circuit Court of Appeals relied on the provision in Rule 50 (b) for the automatic reservation of the legal question raised by a motion for directed verdict as establishing its power to direct the entry of judgment for the Government. The court also held that the Government's failure to make a motion for judgment notwithstanding the verdict, as permitted by the Rule, did not prevent the court from exercising that power, although "it would have been the course of wisdom" for the Government to have made such a motion. The exercise of the power to direct the entry of judgment, rather than the granting of a new trial, was, the Circuit Court of Appeals indicated, warranted in the instant case in the interest of "the orderly administration of justice" (R. 56–57).

The Circuit Court of Appeals expressed the view, *obiter*, that the District Court had erred in ruling that no evidence would be admitted as to petitioner's condition subsequent to December 9, 1935, the date on which a county probate court had adjudged him to be mentally incompetent. The Circuit Court of Appeals was of the opinion that this adjudication, which was made in an informal and *ex parte* proceeding, was only prima facie evidence of insanity as against one not a party to the proceeding, and, in any event, was

not conclusive evidence of total permanent disability (R. 55–56).

SUMMARY OF ARGUMENT

I

The Circuit Court of Appeals properly held that the Government's motion for a directed verdict should have been granted.

A. There was no substantial evidence to support petitioner's claim of the existence of a total mental disability prior to the expiration of insurance protection on or prior to October 31, 1920. The documentary evidence introduced by petitioner does not support his claim, but to the contrary strongly tends to refute it. It shows that, despite six months of hospital treatment and observation of petitioner in four Government hospitals prior to his discharge on April 3, 1919, and numerous examinations thereafter by Government physicians in connection with claims for compensation and vocational training until as late as 1924, no diagnosis of any mental or nervous disorder was made and no irrational act was noted; that, indeed, as late as 1924 a searching examination resulted in a definite finding that there was no neuropsychiatric disability; that even after a diagnosis of psychoneurosis in November 1925, petitioner was not regarded as incompetent despite repeated neuropsychiatric examinations.

Petitioner was adjudicated incompetent in 1935 for the sole stated purpose of permitting someone

to transact business for him, and, there is no substantial evidence of impairment of business judgment in 1920 or thereafter for many years, at least. Moreover, petitioner was found to be mentally competent after observation in a mental hospital for thirty days in 1936.

The undisputed facts concerning petitioner's activities covering a period beginning prior to October 31, 1920, and extending for many years subsequent to that date, are wholly inconsistent with the existence of the claimed total mental disability. They manifest considerable mental ability on the part of petitioner and reflect both the fact that petitioner could not have been totally disabled (including, as they do, his pursuit for at least two years of a college course in agriculture), and reflect an attitude on the part of others toward him likewise inconsistent with the existence of a total mental disability (including, as they do, the fact that a school teacher married him after an extended courtship and bore him four children).

Petitioner's lay testimony is vague and uncertain, both as to its content of meaning and the periods of time to which it refers. Insofar as it related to the time during which his insurance was in force it was given entirely from memory after a lapse of more than nineteen years. Petitioner's opinion testimony has no probative force because it is without foundation and is opposed to the undisputed facts concerning his activities.

B. Even if petitioner's evidence justified an inference of total mental disability on and after October 31, 1920, there is no substantial evidence of the permanence of such total disability on that date.

Petitioner's only testimony directed to the permanence of total disability was without foundation. Moreover, the failure of petitioner to take hospital or other medical treatment for a mental condition for many years at least after the expiration of insurance protection leaves wholly speculative any inference that such total disability, if it existed, was then permanent and not subject to alleviation or cure.

II

The Circuit Court of Appeals properly directed the entry of judgment in favor of the Government pursuant to its finding that the Government's motion for a directed verdict should have been granted.

A. The facts of this case present no reason why a new trial should be granted. The record reveals no rulings adverse to petitioner preventing full development of his case and there is no claim by him of newly discovered evidence. The verdict was in petitioner's favor and, hence, there was nothing which prejudiced him before the jury. There is nothing to suggest that petitioner's case would be altered in any material respect if a new trial were granted.

B. The direction that judgment be entered in favor of the United States does not defeat any purpose of Rule 50 (b) but, on the contrary, accomplishes all of the purposes of that Rule.

The purpose of the Rule was to make possible a just and speedy termination of litigation and this purpose was served by the mature consideration given to the Government's motion for a directed verdict by the Circuit Court of Appeals.

Also, while the Government did not file a motion for judgment notwithstanding the verdict, it did file a motion for a new trial which in fact resulted in mature reconsideration by the District Court of the question raised by its motion for a directed verdict. Accordingly, a motion for judgment n. o. v. would have invoked no different consideration or have achieved any different result.

C. The direction of the Circuit Court of Appeals that judgment be entered in favor of the United States does not violate any of petitioner's rights under the Seventh Amendment.

The essential steps in the practice existing at common law and preserved by the Seventh Amendment are shown to have been met by the reservation of the question presented by the Government's motion for a directed verdict, the ultimate decision upon the reserved question, and the final disposition of the case directed pursuant to that ultimate decision. Petitioner's contention that an essential step in the common law practice preserved by the Seventh Amendment is reconsid-

eration of the reserved question presented by the Government's motion for a directed verdict by the District Court and that this reconsideration must be invoked by a motion for judgment n. o. v. in order to satisfy the requirements of the Seventh Amendment, is without support in the decisions of this Court, in historical analogy or in logic.

III

The trial court committed reversible error in excluding evidence as to petitioner's condition subsequent to the probate court adjudication that he was incompetent and in charging that he was totally permanently disabled as a matter of law on and after that adjudication.

Assuming that the adjudication was one of insanity, we submit that the ruling and the instruction are opposed to the principle supported by the great weight of authority that such an adjudication is not conclusive as against persons not parties or privies to the lunacy proceeding, even as to the existence of insanity on the date of the adjudication. Moreover, even if the adjudication were to be treated as conclusive evidence of insanity on that date, it may not be regarded as conclusive on the issue of total permanent disability since it did not purport to establish either the degree or the duration of the disability resulting from the insanity.

The ruling and the instruction prejudiced the Government in that it relieved petitioner of the burden of establishing that total disability continued to the date of the trial. The instruction was additionally prejudicial in that it prevented the jury from considering the fact, established by evidence, admitted despite the ruling, that petitioner had been found mentally competent at a Government hospital subsequent to the adjudication.

ARGUMENT

I

THE CIRCUIT COURT OF APPEALS PROPERLY HELD THAT THE GOVERNMENT'S MOTION FOR A DIRECTED VERDICT SHOULD HAVE BEEN GRANTED

It is the theory of petitioner's case that he had a total mental disability on or before October 31, 1920, which was then reasonably certain to continue totally disabling for life.

A. THE EVIDENCE

Petitioner was inducted into the military service June 23, 1918, and was discharged April 2, 1919 (R. 2). He had previously been engaged in farming and had worked part of the time in a dry goods store at a salary of $150 a month (R. 15–16, 26–27). He was hospitalized during his service for an injury to his back and other physical ail-

ments including influenza, tuberculosis, and hyperacidity of the stomach. The symptoms and findings in connection with these diagnoses included nervousness (R. 27–28).[1] The back injury was apparently of slight degree and quickly cured (R. 29–30). The tuberculosis became and remained arrested (R. 18–19, 22, 27–30). The acid condition of the stomach either continued or reappeared and appears to have been responsible for complaints by petitioner and his use of anti-acid remedies after service (R. 5, 17, 20, 21, 25).

A report of examination in December 1918, contains the notation "Nervous system: Reflexes apparently normal. Patient gives impressions of neurasthenia" (R. 28). Although insured was treated for physical ailments in four different hospitals during his service in the Army, there was no diagnosis of any mental or nervous disease and it was found upon examination prior to discharge from the service that he was physically and mentally sound except for tuberculosis and second degree flat feet (R. 29).

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[1] "Any moving causes pain. Physical Examination: Negative, except he is very nervous. Lumbar spine very tender and processes of 2d vertebra seem to be out of line. Erector spinae very tense" (R. 27).

* * * * *

"Feels weak. Slight cough and expectoration. Is nervous, troubled with pain in lumbar region, on moving about. These latter pains are transferred down the legs at times * * *. Looks nervous, but not particularly sick" (R. 28).

Petitioner was examined by Government physicians upon numerous occasions after his separation from service, in connection with claims for compensation and vocational training, and petitioner introduced reports of these examinations made prior to December 9, 1935 (R. 18–22). Two of these examinations were made before the expiration of insurance protection on October 31, 1920, and the reports of neither of them disclosed any mental or nervous disease or any symptom indicative of such disease (R. 18). An examination of February 14, 1921, made several months after the expiration of insurance protection contained a diagnosis of hypocondriasis (R. 18).[2] The report does not disclose the basis for the diagnosis nor does it carry any indication that the "anxiety" indicated by the diagnosis was based on any simulated disease or that it was accompanied by melancholia. It discloses, moreover, the additional diagnoses of arrested tuberculosis, chronic amygdalitis (inflammation of the tonsils) and talipes valgus (club foot with flattening of the plantar arch and of the instep).[3]

Between April 2, 1919, the date of his separation from service, and October 31, 1920, the date of final protection under the insurance contract

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[2] This term is defined in the American Medical Dictionary (Dorland), 16 ed., p. 610, as "Morbid anxiety about the health, often associated with a simulated disease and more or less pronounced melancholia."

[3] See the American Medical Dictionary, pp. 79, 1275.

sued upon, petitioner lived on a farm with his mother and brothers, did farm work (R. 17), courted his future wife (R. 6), and in August 1920, reinstated the insurance which he had allowed to lapse upon his separation from service (R. 10). Petitioner married on April 16, 1921 (R. 5), approximately six months after the expiration of insurance protection in October, 1920. He was pursuing a course of vocational training in agriculture at the time and apparently had been so engaged since some time in 1920 (R. 35). The vocational training had been made available to him by the Government and petitioner was examined periodically by Government physicians during the course of his training. After the examination of February 14, 1921, petitioner is shown to have received five examinations prior to the completion of his studies and in none of the reports of these examinations is there any indication of mental or nervous disease (R. 18–19).

Petitioner did not call as witnesses any of his instructors during the period of his vocational training, nor did he introduce any of the training records. Petitioner's wife testified that he "did not go to school every day" and "was in the hospital part of the time" (R. 6), but petitioner, who apparently began his training at a vocational training school at a soldier's home (R. 35), is shown, by the wife's testimony, to have been given instruction thereafter at Waynesville, North Caro-

lina, and finally to have been granted a two-year course at Athens, Georgia (R. 6), apparently at the University of Georgia (R. 44).

The first two examination reports (R. 19) rendered subsequent to petitioner's vocational training (September 30 and December 17, 1924), contained no indication of any mental or nervous disease and the second of these reports contained definite findings that there was "no history or evidence of any psychosis" and "No N. P. [neuropsychiatric] Disability." In the latter report, which was made by a board of physicians, it was stated (R. 19): "Mental examination: Patient answers questions readily and accurately. Orientation and memory good. Insight and judgment good. There is no history or evidence of any psychosis."

In 1924 petitioner rented a fifty-acre farm from a doctor, where he remained for two years, and thereafter purchased a farm twenty-three acres larger, on which he was living with his family at the time of the trial (R. 7).

In July 1925, petitioner applied to an insurance company for a policy of life insurance with provision for total permanent disability benefits (R. 31–32), stating in his application that his health was good (R. 32). Petitioner disclosed in the application that he had suffered an injury to his back during military service and that the Government had paid him compensation of $40 per month during the past two years and during the three

years prior thereto had paid him $145 per month.[4] He withheld information, however, that he had been treated in service for influenza and tuberculosis (R. 31).[5]

Although the physician who represented the insurance company testified that a person can very often conceal mental abnormality (R. 33) he stated in his report that he did not "discover upon examination or inquiry any evidence of disease or functional derangement, past or present, of the brain or nervous system" (R. 32), and he testified that if there had been anything noticeable in petitioner's conduct "from a mental or nervous standpoint" he would have noted it in his

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[4] Although not so described in the application, this sum was vocational training pay. The amount received by petitioner—$145 per month—was the allowance for a trainee who, like petitioner (R. 6), had a wife and one child. See Veterans' Bureau General Order No. 150, November 21, 1921, Regulations & Procedure, United States Veterans' Bureau (1930), Part I, pp. 533, 545–546. It may be noted that the amount of vocational training pay bore no relationship to the degree of the trainee's disability but was governed by the number and relationship of persons dependent upon him and local living costs.

[5] Petitioner thus admitted facts which could have been ascertained by the insurance company from the Veterans' Bureau and concealed pertinent facts which could not have been so ascertained. Information contained in the files of the Veterans' Bureau relating to an individual claimant is confidential except as to the amount of compensation and vocational training pay. (See World War Veterans' Act, June 7, 1924, c. 320, sec. 30, 43 Stat. 607, 615, 38 U. S. C., sec. 456.)

report (R. 30). The company issued a policy but it was "rated up" and contained no disability provision, and petitioner did not accept it (R. 34–35).[6]

The report of examination of petitioner by Government doctors on November 24, 1925 (R. 19) contained the first diagnosis of psychoneurosis.[7] The report did not state whether the condition was moderate or severe at that time, but four of the next six examination reports (R. 19–22), the last of which was made on April 11, 1935,[8] characterized petitioner's neuropsychiatric condition as being of moderate degree and none characterized it as severe. Moreover, petitioner's medical witness gave as the sole reason for the adjudication of incompetence in December 1935, his opinion that petitioner should have someone to

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[6] Petitioner's disclosure of the fact of compensation payments made to him over a considerable period of time provides a sufficient explanation of the failure of the company to grant standard premium rates or disability protection, despite the implication in petitioner's application that such payments were made for an old back injury of which the company's medical examiner could find no evidence, and the fact that no other disability was found (R. 30).

[7] Psychoneurosis is defined in the American Medical Dictionary, pp. 1052–1053, as "any one of a group of borderline disorders of the mind which are not true insanities. The term includes hysteria, neurasthenia, and psychasthenia."

[8] Reports dated December 18, 1935, and June 30, 1936, were excluded under the trial court's ruling that no evidence could be introduced covering the period subsequent to the adjudication by the probate court on December 9, 1935, that petitioner was mentally incompetent (R. 7–11, 22).

transact business for him (R. 24),[9] and in 1936 Government physicians at Roanoke, Virginia, in the one mental hospital in which petitioner was a patient (R. 7), regarded him as mentally competent (R. 26) after an observation of about thirty days (R. 7).

Petitioner, at least during the period from the spring of 1925 through 1927, attended church regularly and was subject to church "dues" (R. 11–12). According to the testimony of one of his witnesses, he showed no signs of not being able to get along with his neighbors and fellow church members until after 1927 (R. 12–13).

Petitioner, according to his wife, converted $3,000 of his war-risk insurance into a policy of Government life insurance in 1927 (R. 6). Since the insurance had lapsed in 1920 (R. 10), the conversion in 1927 presumably occurred only after reinstatement, which required proof satisfactory to the Director that the insured was, at least, not totally permanently disabled.[10] Moreover, petitioner himself filed claim under the contract sued upon. It was filed June 22, 1931 (R. 4), and a committee was not appointed until December 9, 1935 (R. 7). The claim was filed just eleven days prior to the

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[9] There is no testimony directly relating to petitioner's business judgment prior to 1935. His activities between 1919 and 1931 appear not to reflect any impairment of business judgment over that period.

[10] Section 304, World War Veterans' Act, 1924, as amended, 38 U. S. C., sec. 515.

expiration of the limitation on suits on such claims.[11]

One of petitioner's seven lay witnesses regarded him as peculiar and testified that he had difficulties with his neighbors, but this witness first met petitioner in 1925 or 1926 (R. 12). Moreover, it appears through this witness that petitioner farmed regularly until about five years prior to the trial (R. 13) that is until about 1933 (R. 4), and got along with his neighbors without difficulty until 1927, at least (R. 12–13).

Another lay witness had known petitioner all of his life and testified that he was "highly nervous" after service, but fixed the beginning of that nervous condition as ten or twelve years before the trial (R. 14–15), that is, in 1927 or 1929 (R. 4).

The postmaster at Iva, South Carolina, testified that he had seen petitioner "fairly regularly" after service; that petitioner was nervous and "seemed" not to have a grip on himself (R. 16) and "seemed" to complain about his condition (R. 17), but the witness also testified that he had not seen petitioner for the past several years, and prior thereto had seen him "once or twice a year" (R. 16); that he "just met him and his brothers as they passed through Iva * * * and stopped"; that "he could not be sure" as to when petitioner took vocational training and couldn't "recall * * * very clearly" whether peti-

[11] Section 19, World War Veterans' Act, 1924, as amended, 38 U. S. C., sec. 445.

tioner was more talkative after the war than before (R. 17).

A druggist testified that "after he returned" petitioner seemed to be a "changed man" and to find fault with former friends; that he "has been" mad at the witness many times; that he "argues" about his condition; "is" and "has been" in bad shape; "is" always wanting some new medicine and "complains" about his physical condition (R. 16–17). But he did not testify to any irrational act on the part of petitioner and, except for the general statement that it was after petitioner returned, the witness did not specify the periods of time to which any portion of his testimony related.

A brother who lived on a farm with him for a time after petitioner's service, testified that petitioner was nervous and complained of his stomach, talked about the war continually and "couldn't agree" with the witness as he had done before the war; that petitioner was a "physical wreck" and "not able to make a full week" (R. 17). Another brother expressed the opinion that petitioner was a "complete physical and mental wreck, very badly torn up physically and mentally," but, in support of that opinion testified merely that since petitioner's service he had not "seen" him "do any successful work," and that petitioner, in contrast to the witness, wanted to talk about the war continually and was sometimes mad and sometimes in good humor toward the

witness, who, however, was always in good humor toward petitioner (R. 27). Neither of the brothers nor any of petitioner's witnesses testified to any irrational act or manifestation of lack of memory, orientation, or even business judgment on the part of petitioner occurring within the period of insurance protection, or, except for petitioner's wife, at any time even subsequent to the expiration of insurance protection.

The lay witness whose testimony most impressed the District Court (R. 44) was petitioner's wife. She testified that petitioner was suspicious of everybody; that he was "far from well" and complained of his physical condition; that as a result of trying to work on the farm he became "more" nervous; couldn't sleep or retain his food; that he was afraid of being poisoned; threatened to commit suicide and to kill her and the children (R. 5); but the only portion of this testimony specifically related to the period of insurance protection was that petitioner had been suspicious of everybody since his discharge from service (R. 5). The remainder was either specifically or impliedly related to periods of time subsequent to the expiration of insurance protection.

Moreover, her own testimony shows that she was a school teacher living with her mother when she married petitioner after an extended courtship; that she bore him four children (R. 6); that for many years subsequent to 1920, petitioner engaged in such mentally normal activities

as that of pursuing studies in agriculture, renting a farm, purchasing a farm (R. 7), executing an application for insurance with a private company (R. 6), and taking requisite action to protect his rights in connection with Government insurance, including the conversion (and, presumably, the reinstatement) of a portion thereof (R. 6, 10). Her testimony further discloses that, while petitioner was adjudicated incompetent, this did not occur until 1935, and that he was first sent to a mental hospital in 1936 (R. 7).

Petitioner's only medical witness was a Dr. Land who did not "profess to be a mental expert" (R. 24). While Dr. Land's testimony on direct examination clearly implies that he had been petitioner's family physician since a date prior to petitioner's military service;[12] that he had examined petitioner in 1919, finding "at that time" a mental condition which he diagnosed then and

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[12] On direct examination:

"I was the family physician of the Halliday family, and have known James H. Halliday since he was a little tot" (R. 22).

On cross examination:

"As to whether I was ever really the plaintiff's family physician, yes sir.

Q. When?

A. Since about six years ago" (R. 23).

The District Court gained the impression that Dr. Land had "testified that * * * he had been the physician of his (petitioner's) family before the war" (R. 44). There is no testimony bearing on the date as of which Dr. Land became the family physician except the quoted portions of his testimony on direct examination and cross examination.

still regards as psychoneurosis (R. 22),[13] and he expressed or implied opinions that any work by petitioner subsequent to his discharge would have resulted in a "complete collapse mentally and physically" (R. 23),[14] Dr. Land's testimony on cross examination shows that he did not really become petitioner's family physician until "1932 or 1933";[12] that in fact he first examined petitioner "professionally" at that time (R. 25);[13] and that while he regarded conversation as a sufficient basis for expressing an opinion about petitioner's mental condition, and had seen petitioner "on the street or in a drug store" (R. 24), probably two or three times a year "all the way from 1919" (R. 25), he could not (in reply to a question as to whether he had seen petitioner at all during the first four years after his discharge from the

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[12] See footnote on p. 23.

[13] On direct examination:

"He was a very bright boy before he went into the Army. I came in contact with him in 1919. As to what I know about the boy physically and mentally, from the time he was discharged from the Army up until December 1935, well I found that he had an arrested case of tuberculosis, he had some arthritis, and he had a mental condition which I thought at the time, and still think, was a psychoneurosis" (R. 22).

On cross examination:

"I really don't know whether Dr. Webb at Townville was his physician prior to [1933], or who was his physician. I have only been his physician since about six years ago, and from 1919 to that time was not really his physician, and for that period I really don't know anything professionally about him, except from observation. I did not examine him physically until about six years ago" (R. 23).

Army) say "that I had seen him at any stated time" (R. 24).[14]

Dr. Land, who regarded psychoneurosis and hypocondriasis as "practically the same thing" (R. 25), and the former condition as one "which makes a man think he has everything the matter with him" (R. 22),[15] testified [as the apparent basis for his opinion formed, without "professional" examination, that petitioner had psychoneurosis some six years before the first diagnosis of that condition by Government physicians who were examining him periodically (R. 18, 19)] that petitioner was always complaining. He did not

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[14] On direct examination:

"I would not have advised him to do any work, since he has been out of the Army. I think it would have been harmful to him. If he had just been put to work I think he would have a complete collapse, mentally and physically. He is not physically in good shape, and is mentally in bad shape. When he got out of the Army I didn't hold any hope for his recovery, a man in his condition will go from bad to worse. I think he has gradually progressed since he came out of the Army." (R. 23.)

On cross examination:

"Q. * * * Now, during the first four years after his discharge from the Army, when he was taking vocational training most of the time, would you say you had seen him at all during that period?

A. During what period?

Q. The period he was taking vocational training. He was at Waynesville during that time and at Athens, Georgia, and you were here in Anderson practicing medicine?

A. I couldn't say that I had seen him at any stated time." (R. 24.)

[15] Cf., however, the definitions in footnotes 2 and 7, supra, pp. 14, 18.

specify, however, any complaints by the petitioner other than those relating to his stomach[16] and admitted that upon his first examination of petitioner "he seemed to have hyperacidity and I gave him something for that. That is a condition of the stomach" (R. 25). Moreover, there was no lay testimony as to complaints by petitioner relative to any condition other than his stomach, except the testimony of petitioner's wife with respect to a period subsequent to the expiration of insurance protection (R. 6), and it appears possibly significant that the hyperacidity with which petitioner was afflicted in 1932 had also troubled him in 1918 (R. 28), and that the continuance or periodic recurrence of that condition could account both for petitioner's complaints of stomach distress and his use of milk of magnesia (R. 17) and soda (R. 20).

B. DISCUSSION

1. *There is no substantial evidence to support petitioner's claim of a total mental disability prior to October 31, 1920*

The documentary evidence introduced by petitioner does not support his claim of a total mental disability on or prior to October 31, 1920, but to the contrary strongly tends to refute it.

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[16] The doctor testified in this connection: "He always wanted me to do something for him; could I give him something for his stomach; could I do this and that and the other" (R. 25).

Petitioner's documentary evidence relating to his military service shows that in connection with physical ailments temporarily disabling to a total degree, he was found to be nervous, and that, during the same period a physician observed of him that he "gives impressions of neurasthenia." But no single irrational act was recorded upon his service medical record and no diagnosis of mental or nervous disability was made, despite six months of hospital treatment and observation in four service hospitals. And no mental or nervous disability was noted upon petitioner's examination at discharge.

None of the many Government physicians who examined him upon numerous occasions subsequent to discharge (in connection with his claim for compensation and vocational training) ever reported an opinion that he was incompetent and, during the period of insurance protection, none of them made any diagnosis or reported any findings at all indicative of any mental or nervous disorder of any character. Furthermore, as late as 1924, long after the expiration of insurance protection, petitioner's own evidence shows a searching examination in which no neuropsychiatric disability was found and it was reported "There is no history or evidence of any psychosis."

We submit that petitioner's documentary medical evidence, covering a period of more than six years beginning prior to and continuing long after

the date of alleged mental disability, is inconsistent with the existence of *any* such disability, and that it wholly precludes a finding of *total* mental disability. It is not at all credible that petitioner could have had a total mental disability over so extended a period and yet have been able to conceal from so many persons skilled in medical science even the existence of mental disorder.[17]

Indeed, Government physicians who, in November 1925, made the first diagnosis of psychoneurosis based on a "professional" examination, have *never* regarded petitioner as incompetent despite repeated detailed examinations made in the light of that diagnosis, including observation in a mental hospital over a period of thirty days in 1936.

Moreover, Dr. Land, who became petitioner's family physician in 1932 or 1933, did not procure an adjudication that he was incompetent until December 1935. This action was taken at that time merely to permit someone to transact business for him. There is no evidence, documentary or oral, factual or opinion, that petitioner had manifested any impairment of business judgment prior to 1935.

The inference that petitioner could not have had a total mental disability on October 31, 1920, or,

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[17] Cf. *United States* v. *Brown*, 76 F. (2d) 352, 354 (C. C. A. 1); *United States* v. *Earwood*, 76 F. (2d) 557, 559 (C. C. A. 5), certiorari denied, 295 U. S. 762; *United States* v. *Taylor*, 87 F. (2d) 994, 995 (C. C. A. 5).

indeed, for many years thereafter, at least, which we believe to be required by his own documentary medical evidence, is also fully supported by undisputed facts, including those disclosed by other documentary evidence relating to the activities of petitioner subsequent to the date of claimed total disability. Thus, petitioner reinstated his Government insurance on August 1, 1920; successfully prosecuted, prior to 1921, claims for compensation and vocational training on the basis of partial physical disability; married in 1921 a school teacher, who bore him four children; pursued studies in agriculture between 1920 and 1924; rented a farm in 1924 and 1925; purchased a larger farm in 1925 (apparently on time payments); negotiated in 1925 with an insurance company for a $3,000 contract of life and disability insurance (manifesting in those negotiations an apparently detailed knowledge of legislation pertaining to veterans); refused the policy proffered to him, apparently for the sole reason that it did not contain the exact terms and conditions for which he had applied; converted in 1927 (presumably after earlier reinstatement) a Government policy in like amount and containing comparable provisions to those he had sought from the insurance company, which policy was kept in force by premium payments to the date of trial; and filed claim on his original $10,000 contract of Government insurance just eleven days prior to the expiration of the limitation on suit upon such claim. Such activities have been recognized in

numerous cases as being inconsistent with the existence of total disability as the result of a mental disease or from any cause.[18]

The lay testimony offered in support of petitioner's claim of a total mental disability prior to October 31, 1920, was vague and uncertain both as to its content of meaning and the periods of time to which it referred and has no substantial tendency to support the claim. It is wholly consistent with the view, indicated by the documentary medical evidence and the undisputed facts as to his activities and the conduct of others toward him, that, prior to October 31, 1920, and for some years thereafter, at least, petitioner was without mental disability, albeit of an unattractive personality and an unfriendly disposition. Giving to the testimony that petitioner was unfriendly and quarrelsome; that he was complaining of stomach distress and of "this and that and the other" and taking milk of magnesia and other remedies for it; that he was suspicious of every-

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[18] *Lumbra* v. *United States*, 290 U. S. 551, 560–561; *United States* v. *Spaulding*, 293 U. S. 498, 505; *United States* v. *Fain*, 103 F. (2d) 161, 164; 119 F. (2d) 208 (C. C. A. 8), certiorari denied, No. 570, October Term, 1941 (unreported); *United States* v. *Adcock*, 69 F. (2d) 959 (C. C. A. 6); *United States* v. *Hodges*, 74 F. (2d) 617, 618 (C. C. A. 6); *Denny* v. *United States*, 103 F. (2d) 960, 961, 964 (C. C. A. 7); *Grant* v. *United States*, 74 F. (2d) 302 (C. C. A. 5), certiorari denied, 295 U. S. 735; *United States* v. *Jones*, 74 F. (2d) 986 (C. C. A. 5); *United States* v. *Braden*, 92 F. (2d) 682, 684 (C. C. A. 6); *United States* v. *Russian*, 73 F. (2d) 363, 365 (C. C. A. 3).

body, and that he talked excessively about the war, all of the probative value to which, standing alone, it might possibly be entitled, we submit that it fails to meet the indispensable requirement of establishing that petitioner was totally disabled. See *United States* v. *Cochron*, 63 F. (2d) 61, 62 (C. C. A. 10), in which it was said, of far stronger evidence, that it could not be accepted as showing total permanent disability "unless we substitute for insanity in fact a predisposition to insanity. Total and permanent disability are plain, simple words; they must be accepted in their common, practical sense; they mean that the disability of mind or body is such as to render it impossible for the sufferer to follow continuously any substantially gainful occupation."[19]

Additionally, petitioner's lay testimony (as well as that of his single medical witness) was given entirely from memory more than nineteen years after the expiration of insurance protection, and thus more than nineteen years after the period to which most of it was necessarily directed. The courts have recognized that conditions presently or recently existing always color the distant past in the recollections of a memory unaided by contemporaneous records, and hence that testimony in such cases has little, if any, probative value because

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[19] *United States* v. *Brown*, 76 F. (2d) 352, 354 (C. C. A. 1st); *United States* v. *Braden*, 92 F. (2d) 682, 684 (C. C. A. 6th); *United States* v. *Kiles*, 70 F. (2d) 880, 883 (C. C. A. 8th); *Gilmore* v. *United States*, 93 F. (2d) 774, 777 (C. C. A. 5th), certiorari denied, 304 U. S. 569.

"telescoped * * * by time" and colored by the more vivid memories of recent years.[20]

The opinion testimony in support of petitioner's claim has no probative force because it is without foundation and is opposed to the undisputed facts. A brother testified that petitioner was "a mental and physical wreck" and Dr. Land testified that "if he had just been put to work I think he would have a complete collapse mentally and physically." It is noteworthy that each of these witnesses joined his sweeping expression of opinion as to petitioner's mental condition with an equally sweeping expression of opinion as to petitioner's physical condition, although the one was obviously unqualified by training, and the other, while qualified by training, admittedly did not, prior to 1932 or 1933, make the examination requisite to the formulation of an opinion concerning petitioner's physical condition.

Dr. Land's expression of opinion with respect to petitioner's mental condition in 1919 or 1920 was without probative force because he was unable to say that he had seen him "at any stated time" and "never paid any attention to him" when he did see him. Also, the principal basis for Dr. Land's opinion was the fact that when he did see him, petitioner complained of his stomach

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[20] *Cunningham* v. *United States*, 67 F. (2d) 714, 715 (C. C. A. 5); *United States* v. *Earwood*, 76 F. (2d) 557, 559 (C. C. A. 5), certiorari denied, 295 U. S. 762; *United States* v. *Brown*, 76 F. (2d) 352, 354 (C. C. A. 1).

and "this and that and the other," which the physician appears to have assumed represented complaints of a purely imaginary ailment. However, when Dr. Land examined petitioner in 1932 or 1933, he found a physical explanation for the complaints. The only other basis suggested by the physician for his opinion was his testimony that petitioner thought neighbors were "double-crossing" him, but the witness did not specify the dates upon which petitioner manifested this symptom of mental upset. No basis whatever was shown for the brother's opinion that petitioner was a mental wreck nor did the brother disclose the meaning which he meant to convey by this vague expression—which would be consistent with a purely passing emotional upset. The courts have recognized that verdicts may not rest on speculation, conjecture, and surmise,[21] and the rule applies with equal force to opinion testimony.[22]

The opinions of these witnesses are also wholly opposed to the undisputed physical facts. A per-

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[21] *Gunning* v. *Cooley*, 281 U. S. 90, 93; *Stevens* v. *The White City*, 285 U. S. 195, 203-204; *Penna. R. Co.* v. *Chamberlain*, 288 U. S. 333, 344; *United States* v. *Fain*, 103 F. (2d) 161, 163 (C. C. A. 8th); *United States* v. *Mintz*, 73 F. (2d) 457, 459 (C. C. A. 5th); *United States* v. *Hodges*, 74 F. (2d) 617, 618 (C. C. A. 6th).

[22] *United States* v. *Spaulding*, 293 U. S. 498, 506; *United States* v. *Doublehead*, 70 F. (2d) 91, 92 (C. C. A. 10th); *United States* v. *Howard*, 64 F. (2d) 533, 534-535 (C. C. A. 5th); *United States* v. *Meltcritt*, 90 F. (2d) 592, 595 (C. C. A. 2d); *United States* v. *Braden*, 92 F. (2d) 682, 684 (C. C. A. 6th); *United States* v. *West*, 78 F. (2d) 785, 786 (C. C. A. 10th).

son who was a "mental wreck" and unable to work without a complete mental collapse could not possibly have engaged in the numerous activities in which petitioner did engage subsequent to his discharge from service and the lapse of his insurance, nor could he have concealed his condition for so many years from the numerous physicians who examined him, the instructors who taught him, and the neighbors who transacted business with him. It has been recognized that "opinion testimony rises no higher than the level of the logic and the facts on which it is based" (*United States* v. *Hill*, 62 F. (2d) 1022 (C. C. A. 8)) and that "opinion testimony opposed to the physical facts is without probative value."[23]

Moreover, it is quite clear that petitioner's medical witness, concededly not a mental expert, confused a mental disorder (itself not representing a true insanity), with which the Government doctors found petitioner to be afflicted in 1928 and thereafter, with an altogether different condition (sometimes but not necessarily associated with mental disorder), which a Government physician had noted shortly after the

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[23] *United States* v. *Spaulding*, 293 U. S. 498, 506; *Eggen* v. *United States*, 58 F. (2d) 618, 621 (C. C. A. 8th); *United States* v. *Becker*, 86 F. (2d) 818, 820 (C. C. A. 7th); *United States* v. *Thornburgh*, 111 F. (2d) 278, 280 (C. C. A. 8th), certiorari denied, 311 U. S. 604; *Stephenson* v. *United States*, 78 F. (2d) 355, 357 (C. C. A. 8th); *United States* v. *Melbeitt*, 90 F. (2d) 592, 595 (C. C. A. 2nd); *United States* v. *Rakich*, 90 F. (2d) 137, 138 (C. C. A. 8th).

expiration of insurance protection, and thus added the prestige of medical opinion to the effort to relate a recognized mental condition to a period prior to its actual manifestation.

2. *There is no substantial evidence of the permanence of total disability on October 31, 1920, if total disability be assumed to have then existed*

It is well established that there can be no recovery under a contract of war-risk insurance unless a total disability existing during the life of the insurance contract is shown to have become permanent prior to the expiration of insurance protection. Mere permanence of a disability is not enough; it is permanence of totality of disability that is required.[24]

In this case there is no substantial evidence of the permanence of any total disability which might be assumed to have existed on October 31, 1920. Petitioner's only testimony directed to that phase of the case was the testimony of Dr. Land that "when he [petitioner] got out of the Army I didn't hold any hope for his recovery", and that it was his prognosis "back in 1919" that he did not "think he would recover", but, as has been shown (*supra*, pp. 32–34), Dr. Land had no foundation for the expression of any opinion

[24] *United States* v. *Spaulding*, 293 U. S. 498, 504-505; *United States* v. *Gwin*, 68 F. (2d) 124, 126 (C. C. A. 6th); *Poole* v. *United States*, 65 F. (2d) 795 (C. C. A. 4th), certiorari denied, 291 U. S. 658; *United States* v. *Crume*, 54 F. (2d) 556 (C. C. A. 5th).

whatever with respect to the condition of petitioner as early as 1919 or 1920.

Additionally petitioner never received hospital or other medical treatment for any mental condition. He did not even enter a hospital for mental observation until 1936. It has been recognized in numerous cases that neglect or failure to take treatment for a total disability until the condition has become permanent precludes a claim that the total disability was permanent from its inception.[28]

This rule is not in any sense a penalty imposed upon any insured. It is a rule based upon the provisions of the insurance contract requiring certainty of the continuance for life of a total disability before the contract may be regarded as having matured. It merely reflects recognition that in the absence of evidence that treatment has been tried and found unsuccessful, permanence of disability is speculative.

The suggestion in petitioner's brief (pp. 17–22) that the rule should not be applied to mental cases is illogical. Where proof of permanence is lacking a contract of war risk insurance is obvi-

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[28] *Falbo* v. *United States*, 64 F. (2d) 948 (C. C. A. 9th), affirmed *per curiam*, 291 U. S. 646; *United States* v. *Kentfrow*, 60 F. (2d) 488, 489 (C. C. A. 10th); *Earwood* v. *United States*, 90 F. (2d) 494 (C. C. A. 5th), certiorari denied, 302 U. S. 720; *Eggen* v. *United States*, 58 F. (2d) 616, 620 (C. C. A. 8th); *United States* v. *Clapp*, 63 F. (2d) 793, 795 (C. C. A. 2d); *Connelly* v. *United States* (C. C. A. 5th), decided October 30, 1941, not yet reported.

ously not matured, even though a total mental disability exists. Moreover, Congress has provided protection for persons totally disabled as the result of a mental condition, not by waiving the contract provisions, as petitioner in effect appears to suggest, but, in specified circumstances, by waiving the payment of premiums so that the contract itself is continued in force. (See Section 306, subsection c, World War Veterans' Act, 1924, as amended, 38 U. S. C. 517.)[26]

Petitioner relies upon the adjudication of incompetency as bearing on the question of his total permanent disability (Br. p. 20), but this adjudication having been made in 1935, obviously has no tendency to establish either a total or a permanent disability in 1920, or indeed the existence of any mental incapacity at that time.

The long delay in the assertion before the Veterans Administration of the claim (R. 4) that petitioner was totally permanently disabled in

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[26] Petitioner asserts that the Government denied him hospital treatment, and refers in this connection to certain testimony of Dr. Land relating to the year 1937 (Br. p. 17), but petitioner assumed the burden of showing a total mental disability on October 31, 1920, which was then permanent. Prior to 1935, the obvious reason why no treatment for a mental condition was given to petitioner by the Government, was that no such condition was found by Government physicians. The reason why no such treatment was given or sought from 1925 to 1936, is disclosed by the testimony of the wife that petitioner did not want to go to a mental hospital (R. 7).

1920 is strong evidence against its validity.[27] The testimony of petitioner's wife that she did not know of the right "to sue" (R. 6) has no tendency to explain the non-assertion of claim.

We accordingly submit that the Circuit Court of Appeals correctly held that there was no substantial evidence of total permanent disability prior to the expiration of insurance protection.

II

THE CIRCUIT COURT OF APPEALS PROPERLY DIRECTED THE ENTRY OF JUDGMENT IN FAVOR OF THE UNITED STATES

Petitioner contends that the Circuit Court of Appeals was without the power to direct the entry of judgment against him because the Government did not file a motion for judgment notwithstanding the verdict in accordance with Rule 50 (b) of the Federal Rules of Civil Procedure (*supra*, pp. 3–4) (Br. 24–26). He asserts that absent that motion, the Circuit Court of Appeals could only direct that a new trial be given. We submit, however, that the action of the Court of Appeals was proper under the facts of this case, that it fulfills all of the purposes of Rule 50 (b), and that it does not, as petitioner contends, contravene the provisions of the Seventh Amendment.

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[27] *Lumbra* v. *United States*, 290 U. S. 551, 560; *Miller* v. *United States*, 294 U. S. 435; *United States* v. *McCoy*, 73 F. (2d) 786, 787 (C. C. A. 5th); *United States* v. *La Favor*, 96 F. (2d) 425, 429 (C. C. A. 9th).

A. *The proper disposition of this case does not call for a new trial.*—There is no reason to suppose that petitioner's case could be altered in any material respect in the event of a new trial. Presumably he adduced all of the evidence he could muster in support of his claim; if he did not, his failure to do so affords no basis for granting a new trial. The record does not disclose any rulings upon the evidence preventing the full development of petitioner's case and he did not in the Circuit Court of Appeals, either upon the hearing of the appeal or in his petition for rehearing (R. 59–64), and does not now in this Court, suggest that any such rulings were made. He did not in the Circuit Court of Appeals, and does not here, suggest the existence of any newly discovered evidence. He cannot claim that his case was prejudiced before the jury as the result of instructions or in any other manner during the course of the trial, since the jury found in his favor.

Consequently, so far as the facts of this case are concerned, there is no reason why a new trial should be granted. On the contrary, the United States and, for that matter, petitioner himself, should be saved the expense of a new trial, and the direction of the Circuit Court of Appeals that judgment be entered in favor of the United States should be sustained, unless other considerations than the disposition of this case alone require other action. We submit that such considerations do not exist.

B. *The direction that judgment be entered in favor of the United States does not defeat any purpose of Rule 50 (b) but, on the contrary, accomplishes all of the purposes of that rule.*—The purpose of the Rule was to make possible a just and speedy termination of litigation.[28] The provision for the permissible filing within ten days after verdict of a motion for judgment notwithstanding the verdict was obviously designed to accomplish this purpose by eliciting more mature consideration of the question presented by the motion for a directed verdict than is sometimes possible in the course of a trial. And we submit that where, as here, mature consideration has been given to the question presented by the Government's motion for a directed verdict and it has been determined that a just and speedy termination of litigation requires the entry of judgment in favor of the United States, it is immaterial that the mature consideration leading to that conclusion was obtained by other means than the filing of a motion for judgment notwithstanding the verdict. We submit that the controlling factor is the fact that mature consideration has been given (a) in the reviewing courts,[29] and (b) even in

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[28] *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243, 250.

[29] By analogy to the practice at common law, it would appear that the question automatically reserved should not

the District Court, albeit not as a result of a motion for judgment notwithstanding the verdict.

The purpose of achieving a speedy as well as a just termination of litigation would be defeated if it were held that the Circuit Court of Appeals is without the power to direct the entry of judgment in an appropriate case merely because the District Court was not required to consider the question which, at the trial, was reserved for later decision. It is assumed that, of course, the District Court has the power to consider the reserved question even in the absence of any post-verdict motion.[30]

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be regarded as solely, or even primarily, for decision by the District Court. The practice at common law contemplated that the reserved ruling would be considered not at *nisi prius* but by the court *en banc*, as a part of the issues included in the customary rule *nisi*. See the discussion of Lord Blackburn in *Dublin, Wicklow & Wexford Ry. Co.* v. *Slattery*, L. R. 3 A. C. 1155, 1204–1205; Thayer, *Evidence*, 241–244; Tidd, *Practice* (London 1850), II, 904–905. See also American Bar Association Proceedings Re Federal Rules of Civil Procedure (Washington & New York), p. 126.

[30] Unless this is true, the net result of Rule 50 (b), contrary to its undoubted purpose, would likely be to decrease rather than increase the consideration given to a motion for a directed verdict in many cases. Presumably many cases are now presented to the jury with less consideration of the question presented by a motion for a directed verdict than would have been given except for the reservation of the question for later decision, as provided by Rule 50 (b). If the District Court does have the power to reconsider the reserved question *sua sponte* he may, of course, call for briefs and oral argument if he desires them. Cf. American Bar Association Proceedings Re Federal Rules of Civil Procedure (Washington & New York), p. 126.

Undoubtedly, Rule 50 (b) contemplates that the mature consideration of the question presented by a motion for a directed verdict, which is made possible by the automatic reservation, will be given in the first instance by the District Court; nor is it arguable, we think, that the orderly administration of justice ordinarily would best be served when such post-verdict consideration is given to a motion for a directed verdict by the District Court in the first instance. But, we submit, other means should be found to insure such consideration in an appropriate case than to limit the power of reviewing courts to direct the entry of judgment where such action is found necessary after mature consideration to accomplish a just and speedy termination of the litigation.[31]

In any event, so far as this particular case is concerned, the purpose of Rule 50 (b) has been served in all respects. The District Court reconsidered the precise question originally presented

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[31] One such means, perhaps, would be for the reviewing courts to assess the costs of appeal upon the successful appellant in cases in which the motion for judgment was not made in the District Court. Such action would appear particularly appropriate in view of the possibility that the making of the motion might have resulted in the District Court reaching, upon mature reflection, the same conclusion as the reviewing court, with the further possible effect that the expenses of appeal would have been saved. The power of the reviewing courts to make such an assessment of costs appears clear. See Rule 21, Revised Rules of the Circuit Court of Appeals for the Fourth Circuit; Rule 32, Revised Rules of this Court.

by the Government's motion for a directed verdict in passing upon its motion for a new trial, and reached the conclusion, stated in its memorandum order denying that motion, that "there was ample evidence to go to the jury." (R. 44.) The fact that the District Court's consideration of that question was invoked by a motion for a new trial is, we submit, a matter of no consequence. There is obviously no reason to suppose that any more mature consideration would have been invoked or any different conclusion reached had a motion for judgment been filed.

In summary, we submit that the purposes of Rule 50 (b) have been served in all respects; mature consideration of the reserved question was given in the Circuit Court of Appeals and the question is now before this Court; even if reconsideration of the reserved question by the District Court is a *sine qua non* to the power of a reviewing court to direct the entry of a judgment, such reconsideration has been accorded; and the purpose of Rule 50 (b), of making possible a just and speedy termination of litigation, may be defeated in this or any other like case unless the power of the Circuit Court of Appeals to direct judgment n. o. v. for the United States is sustained.

C. *The direction of the Circuit Court of Appeals that judgment be entered in favor of the United States does not violate any of petitioner's rights under the Seventh Amendment.*—We sub-

mit that the decisions of this Court make clear that under the facts of this case there is no merit in petitioner's contention that the direction of the Circuit Court of Appeals to enter judgment for the United States violates his rights under the Seventh Amendment to the Constitution. In *Baltimore & C. Line* v. *Redman*, 295 U. S. 654, 659, it was stated:

> At common law there was a well established practice of reserving questions of law arising during trials by jury and of taking verdicts subject to the ultimate ruling on the questions reserved; and under this practice the reservation carried with it authority to make such ultimate disposition of the case as might be made essential by the ruling under the reservation, such as nonsuiting the plaintiff where he had obtained a verdict, entering a verdict or judgment for one party where the jury had given a verdict for the other, or making other essential adjustments.

The essential steps in the practice existing in common law and preserved by the Seventh Amendment are thus shown to have been (1) the reservation of the question, (2) the ultimate decision upon the reserved question, and (3) the final disposition of the case pursuant to the decision. Here (1) the Government moved for a directed verdict (R. 36), (2) the motion was denied (R. 36), and thus automatically reserved for subsequent decision under Rule 50 (b), and (3) the ultimate decision upon the reserved question die-

PERTINENT STATUTE, REGULATIONS, AND RULE

Pursuant to statute (War Risk Insurance Act of October 6, 1917, c. 105, sec. 402, 40 Stat. 409) and regulation (Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Vol. II, pp. 1233–1237) the contract sued upon provided for payment to the insured of monthly benefits at the rate of $5.75 for each $1,000 of insurance in the event he became totally and permanently disabled while the insurance was in force.

Total permanent disability was defined by regulation (Treasury Decision No. 20, Regulations & Procedure, United States Veterans' Bureau, Vol. I, p. 9), pursuant to statutory authorization (Sec. 402, War Risk Insurance Act), as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *.

Rule 50 (b) of the Federal Rules of Civil Procedure for the District Courts of the United States provides:

> Whenever a motion for a directed verdict made at the close of all the evidence is

denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT

On November 20, 1936, petitioner, having been adjudged by a county probate court as mentally incompetent on December 9, 1935 (R. 4, 7–11), brought suit by his committee in the United States District Court for the Western District of South Carolina to recover benefits under a $10,000 con-

tates the disposition which the Court of Appeals has directed.

Petitioner in effect contends that, although not so recognized by this Court in *Baltimore & C. Line* v. *Redman, supra*, an essential step in the practice preserved by the Seventh Amendment is the reconsideration of the reserved question by the District Court, and, moreover, that this reconsideration must be invoked by a particular motion in order to satisfy the requirements of the Seventh Amendment. We submit, however, that this contention is without support in the decisions of this Court,[32] in historical analogy,[33] in logic.

Reconsideration by the District Court of a question once decided by it would appear no more an essential part of the practice under which the entry

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[32] *Baltimore & C. Line* v. *Redman*, 295 U. S. 654; *Montgomery Ward & Co.* v. *Duncan*, 311 U. S. 243.

Aetna Life Ins. Co. v. *Kennedy*, 301 U. S. 389, 394-395, relied upon by petitioner, was disposed of insofar as any question under the Federal Constitution was concerned, upon the ground that the court's ruling on the motion for a directed verdict had not been reserved. The significance of a motion for judgment notwithstanding the verdict was referred to only as part of the court's discussion of the procedure in the State of Pennsylvania, inapplicable in the Circuit Court of Appeals since, as stated in the opinion, "The Conformity Act does not extend to the Circuit Court of Appeals."

Cf. *Berry* v. *United States*, 111 F. (2d) 615 (C. C. A. 2), reversed on other grounds, 312 U. S. 450; *Conway* v. *O'Brien*, 111 F. (2d) 611 (C. C. A. 2), reversed on other grounds, 312 U. S. 492; *Limbershaft Sales Corp.* v. *A. G. Spalding & Bros.*, 111 F. (2d) 675, 678 (C. C. A. 2).

[33] See footnote 29, *supra*, p. 41.

of judgment n. o. v. is authorized, than is the concurrence of the District Court in the conclusion ultimately reached by a reviewing court. In any event, if reconsideration by the District Court be regarded as an essential step in the practice under which the entry of judgment n. o. v. is authorized by the Constitution, the mere form of motion by which such reconsideration is invoked is surely not an essential step in that practice.

III

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN EXCLUDING EVIDENCE AS TO PETITIONER'S CONDITION SUBSEQUENT TO THE PROBATE COURT ADJUDICATION THAT HE WAS INCOMPETENT AND IN CHARGING THAT HE WAS TOTALLY PERMANENTLY DISABLED AS A MATTER OF LAW ON AND AFTER THAT ADJUDICATION

Early in the trial the court announced that no evidence would be admitted as to petitioner's condition subsequent to December 9, 1935, when the county probate court adjudged him to be incompetent and appointed his wife as his committee (R. 7–11).

The court stated in effect that the admission of such evidence would constitute a collateral attack on a judgment which, the court ruled, could not properly be subjected to such an attack (R. 8). Further, the court charged the jury that they could not go beyond the judgment of the probate court and that, as a matter of law, petitioner was totally permanently disabled from that date (R. 41). Excep-

tion was taken both to the ruling on the evidence (R. 9, 10, 11) and the instruction (R. 42).

Assuming that the adjudication, which is not contained in the record, was an adjudication of insanity, we submit that the ruling and the instruction are contrary to the principle supported by the great weight of authority that an adjudication of insanity is not conclusive as against persons not parties or privies to the lunacy proceeding even as to the existence of insanity on the date of adjudication. *Cathcart* v. *Matthews*, 105 S. C 329; *Hall* v. *Aetna Life Ins. Co.*, 85 F. (2d) 447, 451 (C. C. A. 8th); *Viccioni* v. *United States*, 15 F. Supp. 547, 549–550 (D. C. R. I.), affirmed *Martinelli* v. *United States*, 101 F. (2d) 191 (C. C. A. 1st); *Chaloner* v. *New York Evening Post Co.*, 260 Fed. 335, 337 (D. C. N. Y.); *Johnson* v. *Pilot Life Ins. Co.*, 217 N. C. 139, 143. See also *Ramsey* v. *United States*, 61 F. (2d) 444 (C. C. A. 5th); *Boston Safe Deposit & Trust Co.* v. *Bacon*, 229 Mass. 585, 589; 7 A. L. R. 568, 597.

Moreover, even if the probate court adjudication were to be treated as conclusive evidence that petitioner was insane on the date of the adjudication, it may not be regarded as conclusive on the issue of total permanent disability. The insanity may readily have been recognized in the probate proceeding as limited to a single field of activity on the part of petitioner and, therefore, not totally disabling, or, if total, as temporary in nature and consequently not totally permanently disabling.

As stated in the opinion below, the instant case hinges upon the proof of a disability of mind "far more serious than that required to be proved in a proceeding before the probate court" (R. 56). Cf. *United States* v. *Kiles*, 70 F. (2d) 880 (C. C. A. 8th), and see *Conn. Mut. Life Ins. Co.* v. *Lathrop*, 111 U. S. 612, 620. Accordingly, it is submitted that ~~the court below was correct in stating that~~ the trial court's ruling upon the evidence and its instruction to the jury with respect to the adjudication of the probate court were erroneous.

It is further submitted that the ruling and the instruction were plainly prejudical to the Government since they relieved petitioner of the burden of establishing a substantial part of his case. For, without them, he would have been required to establish, *inter alia*, that his total disability continued to the date of the trial, November 30, 1939. *United States* v. *Spaulding*, 293 U. S. 498, 505, *supra*; *Poole* v. *United States*, 65 F. (2d) 795 (C. C. A. 4th), certiorari denied, 291 U. S. 658; *Personius* v. *United States*, 65 F. (2d) 646 (C. C. A. 9th).

The instruction was additionally prejudical since it advised the jury, in effect, that it could not consider the fact revealed by the testimony of petitioner's wife and Dr. Land, admitted despite the ruling, that petitioner was found mentally competent at a Government hospital as late as 1936, subsequent, of course, to the adjudication (R. 7, 26).

CONCLUSION

For the reasons stated it is respectfully submitted that the Circuit Court of Appeals properly held that the Government's motion for a directed verdict should have been granted and that the judgment of the Circuit Court of Appeals properly included a direction that judgment be entered in favor of the United States. However, if the judgment of the Circuit Court of Appeals should be reversed then the cause should be remanded for a new trial because of prejudicial errors committed by the trial court under its ruling on the evidence and in its charge to the jury.

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SUPREME COURT OF THE UNITED STATES.

No. 101.—October Term, 1941.

James H. Halliday, a Person non Compos Mentis, by his Committee, Annie Halliday, Petitioner,
vs.
United States of America.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 19, 1942.]

Mr. Justice Byrnes delivered the opinion of the Court.

This is a suit brought by the petitioner through his Committee on a $10,000 War Risk Insurance policy. The complaint alleged that petitioner had become permanently and totally disabled by April 2, 1919, the date on which he was honorably discharged by the Army. The insurance contract was in effect on that date and remained in effect until October 31, 1920. At the close of all the evidence the government's motion for a directed verdict was denied. The jury returned a verdict for petitioner and found that he had become permanently and totally disabled by April 2, 1919. The government moved for a new trial, the motion was denied, and judgment was entered on the verdict. On appeal the Circuit Court of Appeals reversed. It held that there was insufficient evidence to go to the jury and it remanded the case to the District Court with directions to set aside the verdict and to enter judgment in favor of the government.

Petitioner sought certiorari on two grounds: that the Circuit Court of Appeals had erred in holding that there was insufficient evidence for the jury; and that, even if the evidence was insufficient, under Rule 50(b) of the Rules of Civil Procedure[1] the Circuit

[1] "Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within 10 days after the reception of a verdict, a party who has moved for a directed verdict may move to have the verdict and any judgment thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not

Court was without power to direct entry of judgment for the government without a new trial. We granted certiorari, as we had in *Berry* v. *United States*[2] and *Conway* v. *O'Brien*,[3] because of the importance of the question concerning Rule 50(b). However, as in those cases, we do not reach that problem since we are of the opinion that the evidence was sufficient to support the verdict.

The insurance contract, the Act of Congress which authorized it,[4] and the regulations issued pursuant to that Act[5] obliged petitioner to prove that he was permanently and totally disabled on or before October 31, 1920, the date of expiration of the contract. We think there was evidence from which, if believed, the jury could have drawn this conclusion.

Period prior to October 31, 1920. Petitioner appeared to his friends and neighbors as a normal and healthy young man before his induction into the Army on June 23, 1918. In August he sailed for France, and in September he injured his back and was admitted to camp hospital. From that time until his discharge, he was examined on several occasions by Army physicians. Their reports reveal that he was "very nervous" and that he gave "impressions of neurasthenia".

While much of the testimony was not specific as to time, several of the witnesses described the appearance and behavior of the petitioner immediately following his discharge in April, 1919. The jury was clearly warranted in regarding their testimony as applicable to the period during which the insurance policy remained in force.

Dr. J. N. Land, a general practitioner who had been "the family physician of the Halliday family" and who had known petitioner from infancy, testified that from 1919 on, petitioner was the victim of psychoneurosis and hypochrondria. These ills caused him to

returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial."

[2] 312 U. S. 450.

[3] 312 U. S. 492.

[4] War Risk Insurance Act of October 6, 1917, c. 105, § 402, 40 Stat. 409.

[5] Bulletin No. 1, Treasury Department, Regulations & Procedure, United States Veterans' Bureau, Volume II, pp. 1233-1237.

talk about himself constantly, to imagine the existence of symptoms, and to become very unfriendly and suspicious. The witness "would not have advised him to do any work since he has been out of the Army," and was of the opinion that work "would have been harmful to him" and would have resulted in "a complete collapse". At the time of his discharge from the Army, the doctor "didn't hold any hope for his recovery". The Circuit Court of Appeals considered this testimony of "little probative force", chiefly because of Dr. Land's admission that he had not examined petitioner professionally until about 1932. But the doctor testified that he had seen petitioner "on the streets or in a drugstore" "at least two or three times a year, possibly more • • • all the way from 1919." Petitioner talked to him "every chance he has got since 1919". In the course of these conversations petitioner would describe his condition at length and ask the witness to do something for him. While the Circuit Court may have regarded the probative force of this evidence as "little", it was clearly proper for the jury to conclude from it and from their understanding of small town life that these encounters and his earlier intimacy with the Halliday family afforded Dr. Land an opportunity to form a reliable estimate of petitioner's condition.

Other witnesses, including his wife and brothers and neighbors, testified that when he returned from the war petitioner "was suspicious of everybody," "didn't seem to be the same man," "seemed to be a man that didn't have a grip on himself," "didn't have the best control of himself." They described him as "a physical wreck," "nervous," "not right," "a complete physical and mental wreck, very badly torn up physically and mentally." And one brother testified that petitioner's condition upon his return was "practically the same as it is today."

Period following October 31, 1920. While it is true that total and permanent disability prior to the expiration of the insurance contract must be established, evidence as to petitioner's conduct and condition during the ensuing years is certainly relevant. It is a commonplace that one's state of mind is not always discernible in immediate events and appearances, and that its measurement must often await a slow unfolding. This difficulty of diagnosis and the essential charity of ordinary men may frequently combine to delay the frank recognition of a diseased mind. Moreover, the totality and particularly the permanence of the disability as of 1920 are sus-

ceptible of no better proof than that to be found in petitioner's personal history for the ensuing 15 years.[6]

Petitioner's wife testified that during this period he was unable to do a full day's work, that he threatened to commit suicide and to kill her and their children, and that he feared attempts to poison him. She stated that although they rented one farm and later bought but never paid for another, they hadn't "done any farming much" and had "just had little patches," and that she and hired hands had been responsible even for this limited enterprise. Dr. Land testified that the mental disorder had gradually progressed since the war.

The reports of government medical examiners and the records of government hospitals reveal a diagnosis of hypochondria on February 14, 1921. And on November 24, 1925 petitioner was found to be psychoneurotic and neurasthenic. On that date he informed the medical examiner that he was unable to work, that he lacked confidence, and that he was often depressed and seized by fear. He complained of "a great many things which physical examination fails to reveal." Reports of subsequent examinations up to and including April 11, 1935, contain similar information and diagnoses. Finally, on December 9, 1935, at the instance of Dr. Land, petitioner was adjudged incompetent by a county Probate Court and his wife was appointed as a committee to handle his affairs.

In support of its conclusion the Circuit Court of Appeals observed that "insured's failure to secure adequate hospitalization" leaves it "highly speculative whether insured's ailments, whatever these may have been, would not have been cured by the medical treatment which was in his potential grasp." There can be no doubt that evidence of the failure of attempted treatment would have been highly persuasive of the permanence of petitioner's disability. And the jury was entitled to draw inferences unfavorable to his claim from the absence of such evidence. However, this was but one of the many factors which the jury was free to consider in reaching its verdict. In the face of evidence of a mental disorder of more than 15 years duration, it can hardly be said that the absence of this single element of proof was fatal to petitioner's claim. Moreover, inferences from failure to seek hospitalization and treat-

[6] The trial judge instructed the jury: "All of this evidence as to his condition in later years, however, is to be considered by you for the purpose of determining whether the insured became in fact permanently and totally disabled on or before April 2, 1919, or before August, September, or October, 1920."

ment must be drawn with the utmost caution in cases of mental disorder, where, as here, there is reason to believe that one of the manifestations of the very sickness itself is fear and suspicion of hospitals and institutions.

Although it was unnecessary to its disposition of the case, the Circuit Court of Appeals considered and noted its agreement with the government's objection to the District Court's refusal to admit evidence of petitioner's condition subsequent to December 9, 1935, the date on which petitioner was adjudged incompetent by the county probate court.[7] We think that the District Court's ruling was erroneous, but there is nothing to show that it was seriously prejudicial to the government. Neither in the District Court nor in this Court has the government suggested its ability to produce evidence from the period subsequent to 1935 which would substantially alter the state of the record.

The case is remanded to permit the reinstatement of the judgment of the District Court.

Reversed.

Mr. Justice ROBERTS and Mr. Justice JACKSON took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

[7] The same ruling was embodied in the instructions to the jury.